CLERK'S COPY.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1932

## No. 677

THE UNITED STATES OF AMERICA ON RELATION OF LUCIEN H. GREATHOUSE AND REBEKAH S. GREATHOUSE, PETITIONERS,

*vs.*

GEORGE H. DERN, ~~PATRICK J. HURLEY~~, AS SECRETARY OF WAR, AND LYTLE BROWN, AS CHIEF OF ENGINEERS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED FEBRUARY 9, 1933

CERTIORARI GRANTED MARCH 13, 1933

(37,374)

# (37,374)

# SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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# Court of Appeals of the District of Columbia

No. 5692.

THE UNITED STATES OF AMERICA on Relation of LUCIEN H. GREATHOUSE and REBEKAH S. GREATHOUSE, Appellants,

vs.

PATRICK J. HURLEY, as Secretary of War, and LYTLE BROWN, as Chief of Engineers.

*a* Supreme Court of the District of Columbia.

At Law.

No. 78662.

THE UNITED STATES OF AMERICA on Relation of LUCIEN H. GREATHOUSE and REBEKAH S. GREATHOUSE, Plaintiffs,

vs.

PATRICK J. HURLEY, as Secretary of War, and LYTLE BROWN, as Chief of Engineers, War Department, Defendants.

UNITED STATES OF AMERICA,
*District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia
(Holding a Circuit Court).

At Law.

No. 78662.

THE UNITED STATES OF AMERICA on Relation of LUCIEN H. Greathouse and Rebekah S. Greathouse, 5329 16th Street N. W., Washington, D. C., Plaintiffs,

vs.

PATRICK J. HURLEY, as Secretary of War, Washington, D. C.; Lytle Brown, as Chief of Engineers, War Department, Washington, D. C., Defendants.

*Petition for Writ of Mandamus.*

Filed Sept. 30, 1930.

Come now the above named Plaintiffs, and as ground for their petition for a writ of mandamus, allege:

I. That the Plaintiffs are husband and wife and are citizens of the United States and residents of the District of Columbia. That at all times herein mentioned they were upwards of twenty-one years of age.

II. That the defendant, Patrick J. Hurley, is the duly appointed, qualified and acting Secretary of War of the United States and is temporarily a resident of the District of Columbia, and is sued herein in his official and representative capacity and not otherwise; that the defendant, Lytle Brown, is the duly appointed, qualified and acting Chief of Engineers of the United States Army and is temporarily a resident of the District of Columbia and is sued herein in his official and representative capacity and not otherwise.

III. That the plaintiffs are the owners in fee simple of that certain parcel of land situate in the State of Virginia and more particularly described as follows:

"Beginning at an original set stone at the southeast corner of the old Richard B. Lloyd estate and in the west line of the old Worthington tract; thence running along the

said west line of the old Worthington tract N. 7°
2 25′ E. 691.10 ft. to a point; thence S. 61° 22′ 30″ East 100 ft. to a point; thence N. 13° 45′ E. 225 ft. to the Potomac River; thence following the bank of the Potomac River S. 66° 57′ E. 175.00 ft. to a point; thence departing from the said south shore line of Potomac River and running through the old Worthington tract S. 4° 46′ W. 510.30 feet to an old stone set at an angle point in Mackey road; thence South 38 degrees 16 minutes West 34.42 feet to the intersection of the South side of Mackey Road with the centre line of a road 30 feet wide, being part of Mackey Road which runs North Easterly from the Lee Highway; thence South 12 degrees 30 minutes West binding on the centre line of said Road 268.92 feet to the old north line of Lee Highway; thence running with the said North line of Lee Highway South 67 degrees 25 minutes West 437.07 feet, to a point in the north line of the Washington & Old Dominion Railway Company's right of way; thence running with the said north line of the Washington & Old Dominion Company's right of way S. 84° 11′ W. 108.08 feet to a point and the southwest corner of lot #8 in the subdivision of West Colonial Heights; thence departing from the said north line of the Washington & Old Dominion Company's right of way and running through lots 8 and 9 of said subdivision N. 65° 50′ E. 107.33 feet to a point in the line common to lots 9 and 10 in said subdivision; thence running with the said line common to lots 9 and 10 N. 3° 33′ W. 106.69 feet to a point in the south line of a 15 foot alley; thence running along the south line of said alley N. 86° 27′ E. 130.00 feet to a point; thence running across the end of said alley N. 3° 33′ W. 15.00 feet to a point in the south line of the old Richard B. Lloyd estate; thence running with the said south line of the old Richard B. Lloyd estate N. 86° 27′ E. 35.00 feet to the point of beginning.

"Being the lot of ground which is shown upon the survey or plat of certain lots and portions of lots in the subdivision of West Colonial Heights and of a portion of the old Worthington Tract at Rosslyn, Arlington County, Va., as prepared by Thomas M. DeLashmutt and dated April 28, 1930.

"Excepting and excluding, however, that lot or parcel of ground designated as the Lucas Lot as laid down on the said DeLashmutt survey or plat, consisting of four thousand square feet of land or 0.0918 acres."

That said lands are adjacent to and are bounded on the north side by the navigable waters of the Potomac River on the Virginia shore and as owners of such lands, Plaintiffs are entitled to all the riparian rights thereunto
3 appertaining.

That Article 7 of the Compact of 1785 between Maryland and Virginia (Virginia Statutes at Large, 1823, Vol. 12, Chapter 17) says:

"The citizens of each State, respectively shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river";

That under the above-cited article, riparian owners of land in Virginia had the right to construct wharves that did not interfere with navigation; that the land belonging to Plaintiffs is in that part of Virginia which was ceded to the United States to create the District of Columbia, but receded to Virginia.

That the Act of Cession from Virginia to the United states of December 3, 1789, contained the following proviso:

"That nothing herein contained shall be construed to vest in the United States any right of property in the soil, or to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States."

That the Act of Recession of July 9, 1846, contained the following:

"all the rights and jurisdictions therewith ceded over the same, be, and the same are hereby, ceded and forever relinquished to the State of Virginia, in full and absolute right and jurisdiction, as well of soil as of persons residing or to reside thereon."

Everything ceded by the Act of December 3, 1789, was receded by the Act of July 9, 1846. That neither Plaintiffs nor their predecessors in interest have ever transferred any of their property or rights appertaining thereto to the United States or to any other body politic.

That Plaintiffs as riparian proprietors in Virginia have the right to build out private wharves so as to reach the navigable waters of the Potomac River.

IV. That on the 24th day of June, 1929, Charles H. Greathouse was the owner of the property described in paragraph 3 hereof and on that date he entered into an agreement to sell said real estate to the Sun Oil Company, said sale being contingent upon the granting of permission to erect tanks, warehouses and other equipment thereon and the construction of requisite wharves, piers, pipe lines and moor-
4 ings out from and in front of said property into and in the Potomac River for the loading and unloading of tanks, barges and other light vessels; that under the terms of said agreement application for such permission could be made by the said Charles H. Greathouse at his option either in his own name or in the name of Sun Oil Company.

V. That pursuant to said agreement application was duly made to the Board of Supervisors of Arlington County, Virginia for permission to construct on the lands above described, tanks, warehouses and other equipment; that said permission was granted and permit issued under date of October 29, 1929 by the Board of Supervisors of Arlington County, a true copy of which is attached hereto, as "Exhibit A" and made a part of this petition.

VI. That there was then and is now in effect a certain statute of the United States which was part of the Rivers and Harbors Appropriation Act of March 3, 1899 (30 Stat. 1151), which is also contained in Title 33 U. S. C. A., Chap. 9, page 397, Paragraph 403, entitled "Obstruction to navigable waters, generally; wharves, piers, etc.; excavation and filling in", as follows:

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead haven, harbor, canal, navigable river, or other water of the United States outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary

of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater or of the channel of any navigable water of the United States, unless the work has been recommedend by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

That in further pursuance of the agreement between Charles H. Greathouse and Sun Oil Company, described in paragraph IV hereof, on the 24th day of October, 1929, application was duly made by the Sun Oil Company to the defendant, the Chief of Engineers of the United States Army, under the provisions of said Act, for permission to construct a wharf from the Virginia side of the Potomac River above the Key Bridge, adjacent to and abutting on the lands hereinabove described; that said application was accompanied by the necessary plans and specifications as required by the Chief of Engineers. That a copy of said plans and specifications are hereunto attached, marked Exhibit "B" and made a part hereof. That the proposed wharves and fender piles, if constructed, will not interfere with navigation in the Potomac River. That subsequent to the filing of said application and on or about the 9th day of May, 1930, a hearing was held before the defendant, the Chief of Engineers with respect to said application.

VII. That on to-wit, April 29, 1930, the said Charles H. Greathouse conveyed the real estate herein described, and all rights under the agreement and application above referred to, to these plaintiffs. That on the 9th day of May, 1930, while said application was pending before the Chief of Engineers, these plaintiffs entered into an agreement with the Sun Oil Company for the sale of said lands containing the same provisions as those in the contract of Charles H. Greathouse hereinbefore described. Plaintiffs under the terms of said agreement, and as owners of said real property, are entitled to all benefits and inchoate rights resulting from the efforts of the Sun Oil Company to obtain permits for such construction.

VIII. That under the terms of the Act of Congress of March 3, 1899, above referred to, wharves, fender piles,

etc., may be constructed in accordance with plans recommended by the Chief of Engineers, and authorized by the Secretary of War; that the defendant, the Chief of Engineers, considered the plans attached to the application and found that they did not obstruct navigation in the waters of the Potomac River, and accordingly on the 7th day of August, 1930, recommended approval of such plans, as set forth in Exhibit "C", attached hereto and made a part hereof.

IX. That said recommendation of approval of said plans by the defendant, the Chief of Engineers, was in due course submitted to the defendant, the Secretary of War, for appropriate authorization by him, prior to issuance of permit by defendant, the Chief of Engineers, under the adopted procedure of the War Department; that the Secretary of War thereafter refused to authorize the construction of wharves, fender piles, etc., as shown by his letter of August 15, 1930, attached hereto and marked Exhibit
6 "D"; that the Secretary of War based his decision not on the ground of obstruction to navigation, but on considerations involving the development of public parks and other matters having no relation to navigation. The Secretary of War addressed a letter to Mr. J. Edgar Pew, President of the Sun Oil Company, in which he stated:

"After having gone into the matter fully with yourself and your representative, and with Colonel Ulysses Grant III, the Chairman of the National Capital Park and Planning Commission, I have concluded that the development contemplated by you interferes with a public policy."

That the discussion referred to in said letter with Mr. Pew, his representative and Colonel Ulysses Grant III, was devoted to consideration of the possible interference of the plans of the Sun Oil Company with a public park, contemplated by the Park and Planning Commission on the property of plaintiffs.

X. That the defendant, the Secretary of War, acted without authority of law in refusing to approve the said application on the ground that it interferred with a Public Policy involving a public park; that such action on the part of the defendant, the Secretary of War, was unreasonable and arbitrary; that by reason of the refusal of the

defendant, the Secretary of War, to authorize said construction, the defendant, the Chief of Engineers has refused and still refuses to issue a permit in accordance with said application.

XI. That it is contrary to law thus to deny to the plaintiffs herein their rights as riparian owners to erect wharves, etc., and to use the navigable waters of the streams so long as such structures do not constitute an obstruction to navigation. No harbor lines have been established opposite said real property.

XII. That unless the proposed structures are authorized by the defendant, the Secretary of War, plaintiffs will be unable to sell their property to the Sun Oil Company or to any other persons desiring to use the riparian rights and plaintiffs' riparian rights will thus be destroyed.

XIII. That the refusal of the defendant, the Secretary of War, to authorize the erection of the wharf, etc., under the Act of March 3, 1899, as above set forth, deprives the plaintiffs of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

7

XIV. Plaintiffs, because of the matters herein stated, allege that the defendant, the Secretary of War, was required, under the terms of the Act of Congress of March 3, 1899, after the defendant, the Chief of Engineers, had approved the plans submitted, to perform the duty of authorizing the construction of said wharf, but that the defendant, the Secretary of War, has refused and still refuses to perform such duty and comply with the terms of the said act of Congress.

XV. That all procedure in the War Department has been exhausted and no further remedy exists therein, and the plaintiffs are without remedy save as prayed for in this proceeding.

Wherefore these plaintiffs pray this Honorable Court:

1. That an order be issued requiring the defendants to show cause within such reasonable time as the court may deem proper, why a Writ of Mandamus should not issue herein;

2. That this court will adjudge that plaintiffs are entitled to the approval of their application as hereinabove set forth and will issue its writ of mandamus commanding

said Secretary of War and the Chief of Engineers, to authorize the construction of a wharf and fender piles in the Potomac River on the Virginia Shore adjacent to the land owned by plaintiffs herein as hereinabove described, as heretofore applied for.

LUCIEN H. GREATHOUSE,
REBEKAH S. GREATHOUSE,
*Plaintiffs.*

CHESTER I. LONG,
PETER Q. NYCE,
SAMUEL W. McINTOSH,
JOHN MARSHALL,
SPENCER GORDON,
*Attorneys for Plaintiffs.*

8 DISTRICT OF COLUMBIA, *ss:*

Lucien H. and Rebekah S. Greathouse, being first duly sworn, upon oath state:

That they are the persons described in and who executed the above and foregoing petition; that they are familiar with the contents thereof; that the statements therein made are true except those made on information and belief, which they believe to be true.

LUCIEN H. GREATHOUSE.
REBEKAH S. GREATHOUSE.

Subscribed and sworn to before me this 30th day of September, 1930.

[SEAL.] SAMUEL W. McINTOSH,
*Notary Public.*

My commission expires September 10, 1933.

9 "EXHIBIT A."

Filed Sep. 30, 1930.

At the regular meeting of the board of supervisors of Arlington County, Virginia, held at the courthouse thereof at 10 o'clock a. m., Monday, September the 30th, 1929.

Present: Edward Duncan, chairman, member of the board from Jefferson district; B. M. Hedrick, member of the board from Arlington district; E. C. Turnburke, member of the board from Washington district.

In re Sun Oil Co. Application to Erect Gasoline Tanks, etc.

Upon the petition of the Sun Oil Co., permission is hereby granted to said company to erect tanks, warehouses, garages and other equipment to be used in a general oil product distributing business on the property described on sheet 2 of the request of the Sun Oil Co. filed with the zoning commission of Arlington County, Va., and made a part of this minute, for the erection of said equipment, such tanks and equipment to be used for the storage of oil and gasoline, and when said equipment has been erected, according to the conditions prescribed by this board, permission is hereby granted to store and accumulate for sale, wholesale or retail or private use, oil and gasoline, in pursuance of an ordinance of this board heretofore enacted.

Upon a vote being taken, Supervisors Hedrick and Duncan voted aye and Supervisor Turnburke voted nay.

A copy. Test:

Given under my hand this 29th day of October, 1929.

[SEAL.] WM. H. DUNCAN,
*Clerk*,
By R. E. REMINGTON,
*Deputy Clerk*.

(Here follows plat marked page 10.)

11 "EXHIBIT C."

Filed Sep. 30, 1930.

Request has been made to the War Department for a copy of the recommendation of the Chief of Engineers finding that said wharf and fender piles would not obstruct navigation, but said request has been denied.

12 "EXHIBIT D."

Filed Sep. 30, 1930.

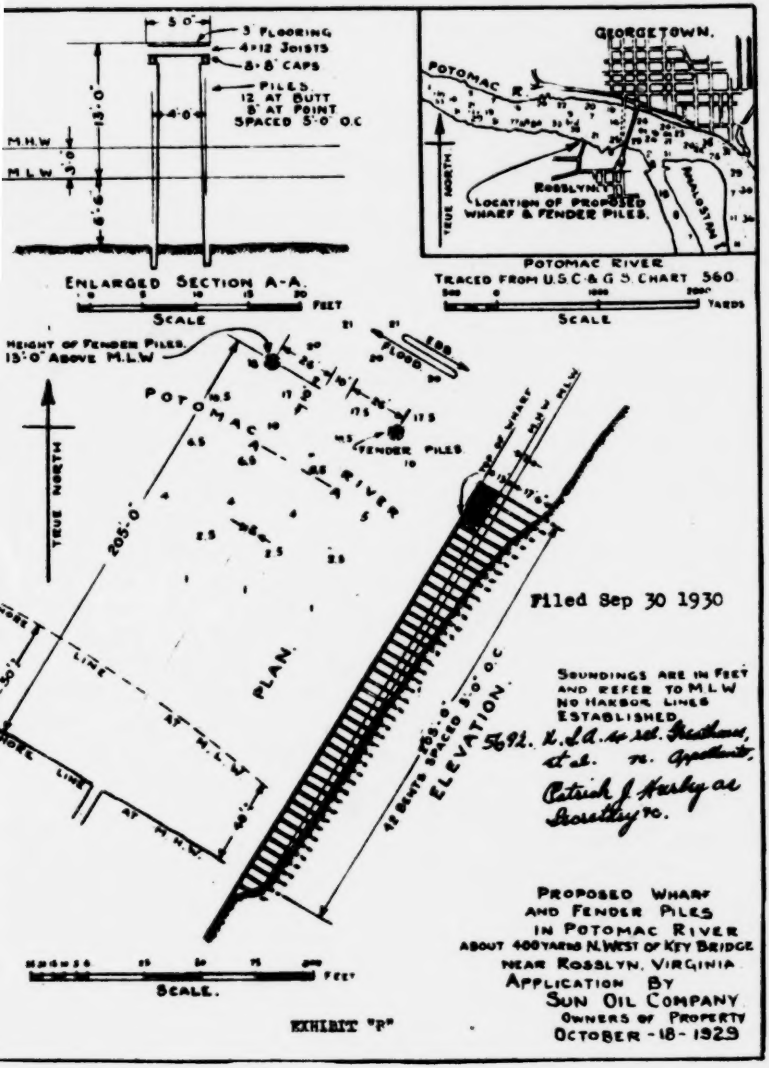
War Department.

Washington, D. C., August 15, 1930.

Mr. J. Edgar Pew,
Sun Oil Company,
Philadelphia, Pa.

DEAR MR. PEW:

After careful consideration of the application of the Sun Oil Company for authority to construct a wharf and fender




Filed Sep 30 1930

SOUNDINGS ARE IN FEET AND REFER TO M.L.W.
NO HARBOR LINES ESTABLISHED

5692. U.S.A. to Sol. Friedman, et al. vs. Appellants, Patrick J. Hurley as Secretary &c.

PROPOSED WHARF AND FENDER PILES IN POTOMAC RIVER ABOUT 400 YARDS N. WEST OF KEY BRIDGE NEAR ROSSLYN, VIRGINIA
APPLICATION BY
SUN OIL COMPANY
OWNERS OF PROPERTY
OCTOBER - 18 - 1929

piles in the Potomac River a short distance above Key Bridge, near Rosslyn, Virginia, I have decided that I will not approve the application.

Sincerely yours,

(Signed) PATRICK J. HURLEY,
*Secretary of War.*

13 *Rule to Show Cause.*

Filed Sep. 30, 1930.

* * * * * * *

Upon consideration of the petition this day filed in the above entitled cause, it is by the Court this 30th day of September, 1930,

Ordered that the defendants, Patrick J. Hurley, as Secretary of War, and Lytle Brown, as Chief of Engineers, show cause in this Court on the 20th day of October, 1930, at 10 o'clock a. m. why the writ of mandamus should not issue as in said petition prayed, provided that a copy of this order be served on said defendants on or before the 6th day of October, 1930.

O. R. LUHRING,
*Justice.*

*Marshal's Return.*

Served a copy of the within Rule & Petition on Patrick J. Hurley, Sect. of War, by serving Lt. Col. W. A. Graham, Judge Advocate General's Office, 10/1/30, and Lytle Brown, as Chief of Engineers, 9/30/30, Personally.

EDGAR C. SNYDER,
*U. S. Marshal in and for the Dist. of Columbia,*
By C. G. COWLEY,
B.
*Deputy U. S. Marshal.*

14 *Several Answer of Respondent.*

Filed Nov. 12, 1930.

The respondent, Lytle Brown, Chief of Engineers, U. S. Army, files this his answer to the rule to show cause and petition for mandamus filed herein and reserving unto

himself the benefits of all manner of objections to the errors and insufficiencies of the petition filed herein the jurisdiction of the court in the premises, nevertheless answering so much and such parts of the petition as he is advised is material and necessary for him to answer and as to which he has knowledge sufficient to form a belief thereof: says:

I. The respondent admits that an application to construct a wharf into the waters of the Potomac River and accompanying plans were filed with him by the Sun Oil Company under the Rivers and Harbors Act of March 3, 1899 (30 Stat., 1151) and that on to wit, May 9, 1930, a hearing was held by the respondent in respect to said application. That the respondent considered the plans and the matters brought out at the hearing and found that the proposed structure would not obstruct navigation in the waters of the Potomac River, and on to wit, August 7, 1930, recommended the approval of the plans as set forth in the petition. The respondent has done all that the law requires him to do, and is without power to do anything further.

Wherefore, having fully answered, respondent prays that the rule to show cause be discharged, the petition dismissed, and that the respondent have his reasonable costs.

LYTLE BROWN,
*Chief of Engineers, War Department.*

LEO A. ROVER,
*United States Attorney.*
JOHN W. FIHELLY,
*Assistant United States Attorney.*

DISTRICT OF COLUMBIA, *ss:*

Lytle Brown, as Chief of Engineers, War Department, being first duly sworn, deposes and says that he is the respondent named in the above entitled action, and that he has read the foregong answer by him subscribed as Lytle Brown, Chief of Engineers, War Department, and knows the contents thereof and that the matters and things therein he verily believes to be true.

LYTLE BROWN,
*Chief of Engineers, War Department.*

Subscribed and sworn to before me this 12th day of November, 1930.

[NOTARIAL SEAL.] JOHN F. BRADY,
*Notary Public, D. C.*

My commission expires June 8, 1932.

16 *Answer of Respondent.*

Filed Nov. 12, 1930.

The respondent, Patrick J. Hurley, Secretary of War, files this his answer to the rule to show cause and petition for mandamus filed against him and reserving unto himself the benefit of all manner of objections and exceptions to the errors and insufficiencies of the petition filed herein and the jurisdiction of the Court in the premises, nevertheless answering so much and such parts of the petition as he is advised it is material and necessary for him to answer unto, says:

I. The allegations contained in paragraph I of the petition are admitted.

II. The allegations contained in paragraph II of the petition are admitted.

III. The allegations contained in paragraph III of the petition are denied, except the allegations therein setting forth Article 7 of the Compact of 1785 between Maryland and Virginia and the Act of Cession from Virginia to the United States of December 3, 1789 and the Act of
17 Recession of July 9, 1846, with exceptions are admitted.

IV. The respondent is without information as to the allegations of paragraph IV of the petition and if they be deemed material by the Court, demands strict proof thereof.

V. Respondent is without knowledge and information as to the verity of the allegations stated in paragraph V of the petition and therefore denies the averments thereof.

VI. The respondent admits that there is in effect a certain statute of the United States which is a part of the Rivers and Harbors Appropriation Act of March 3, 1899 (30 Stat. 1151), which is also contained in Title 33, United States Code Annotated, chapter 9, page 397, paragraph 403, entitled "Obstruction to navigable waters, generally;

wharves, piers, etc.; excavation and filling in", but the respondent is without knowledge and information as to the verity of the allegation that, in pursuance of an agreement between Charles H. Greathouse and the Sun Oil Company, as set forth in paragraph IV of the petition, application was made by the Sun Oil Company for the construction of the wharf, and therefore denies so much of the allegation in paragraph VI as states that the Sun Oil Company made application to the respondents or either of them, in pursuance of an agreement with the said Charles H. Greathouse. The respondent denies that the proposed wharves and fender piles would not interfere with navigation in the Potomac River, but admits the allegations that on or about the 9th day of May, 1930, a hearing was held by the respondent, the Chief of Engineers, in respect to the said application of the Sun Oil Company. The respondent denies that the proposed wharf was to lie adjacent to and abutting on lands as described in the petition.

VII. The respondent is without knowledge and information as to the verity of the allegations set forth in
18 the first and second sentence of paragraph VII of the petition and therefore denies the averments. The respondent denies the allegation in the last sentence of paragraph VII of the petition that the plaintiffs are entitled to all benefits and inchoate rights resulting from the efforts of the Sun Oil Company to obtain permits for such construction.

VIII. The respondent, by way of answer to paragraph VIII of the petition, admits that under the terms of the Act of Congress of March 3, 1899, to which reference has heretofore been made, wharves, fender piles, ect. may be constructed in accordance with plans recommended by the Chief of Engineers and authorized by the Secretary of War, and admits that the respondent, the Chief of Engineers, considered the plans attached to the application and found that they did not obstruct navigation in the waters of the Potomac River and accordingly on the 7th day of August, 1930, recommended the approval of such plans.

IX. By way of answer to paragraph IX of the petition, the respondent admits that the recommendation of the respondent, the Chief of Engineers, was submitted to the respondent, the Secretary of War, for his appropriate ac-

tion and that the Secretary of War, thereafter did refuse to authorize the construction of wharves, fender piles, etc. as shown by his letter of August 15, 1930, attached to and marked Exhibit "D" of the petition, but the respondent denies that the decision of the respondent, the Secretary of War, was not based on the ground of obstruction to navigation but was based on considerations involving the development of public parks and other matters having no relation to navigation. The respondent admits that he addressed a letter to Mr. J. Edgar Pew, President of the Sun Oil Company, as alleged in paragraph IX of the petition, and admits that the discussion referred to in his letter with his representatives and Colonel Ulysses Grant III was devoted

to the consideration of the possible interference of
19 the plans of the Sun Oil Company with the public
park policy contemplated by the Park and Planning

Commission on the property of plaintiffs. By way of further answering to paragraph IX of the petition, the respondent avers that his letter addresed to Mr. J. Edgar Pew, President of the Sun Oil Company, to which reference has heretofore been made, was mailed and dispatched to the said J. Edgar Pew, twelve days after the formal declination of the authorization for the construction of the said wharf, to wit, on August 27, 1930, and a copy of said letter is attached hereto and made a part hereof and marked Exhibit "A".

X. The allegations set forth in paragraph X of the plaintiffs' petition are denied in their entirety.

XI. That by way of answer to paragraph XI of the petition, respondent denies the allegations contained in the first sentence thereof, but admits that no harbor lines have been established opposite said real property.

XII. That in answer to the allegations contained in paragraph XII of the petition, the respondent is without knowledge of the averment that unless the proposed constructions are authorized, the plaintiffs will be unable to sell their property to the Sun Oil Company or to any other persons. The respondent is informed and believes, and therefore avers, that the petitioners are without riparian rights that can be destroyed by refusal of the respondent, the Secretary of War, to authorize the construction of said wharf.

XIII. The respondent denies the allegations of paragraph XIII of the petition in their entirety.

XIV. The respondent denies each and every material allegation set forth in paragraph XIV of the plaintiffs' petition.

20 XV. The respondent denies each and every material allegation set forth in paragraph XV of the plaintiffs' petition.

Further answering the petition by way of a separate and distinct answer thereto, respondent alleges that the petition does not show that the relators are entitled to the performance of the duty on the part of the respondent, the Secretary of War, as in said petition claimed, nor does it show any duty on the part of the said respondent to issue to the said relators any certificate of authority authorizing the said relators to erect a wharf or other structure into the waters of the Potomac River.

Further answering the petition by way of a separate and distinct answer thereto, respondent avers that he acted within the discretion vested in him by Section 10 of the Act of March 3, 1899, when on August 15, 1930, he refused to authorize the construction of the proposed wharf and fender piles. Respondent is informed and believes, and therefore avers, that said discretionary act cannot be controlled by mandamus.

Further answering the petition by way of a separate distinct answer thereto, respondent alleges that to have authorized the construction of the wharf by the Sun Oil Company would have been to cause the erection of a structure inimical to the proposed improvement as contemplated and authorized by the Act approved May 29, 1930 (Public No. 284, 71st Congress) entitled "An Act for the acquisition, establishment, and development of the George Washington Memorial Parkway along the Potomac from Mount Vernon and Fort Washington to the Great Falls, and to provide for the acquisition of lands in the District of Columbia and the State of Maryland and Virginia requisite to the comprehensive park, parkway, and playground system of the National Capital", and that the authorization for the erection of such structure would be against a public policy of the United States.

21 Further answering the petition by way of a separate and distinct answer thereto, respondent is in-

formed and believes, and therefore avers that the relators have not made application to either of the respondents for permission to erect a wharf or other structure under the provisions of Section 10 of the Act of March 3, 1899 (30 Stat. 1151), and, therefore, no right has been denied them by reason of the refusal of the respondent, the Secretary of War, to authorize the Sun Oil Company to construct a wharf or other structure into the waters of the Potomac River.

Further answering the petition by way of a separate and distinct answer thereto, respondent states that he is informed and believes and therefore avers that the United States is the owner in fee of the south bank of the Potomac River within the limits of the District of Columbia to the high water mark of 1792 of the Potomac River.

Wherefore the respondent, having fully answered, prays that the rule to show cause be discharged, the petition dismissed, and that the respondent have his reasonable costs.

PATRICK J. HURLEY,
*Secretary of War.*

LEO A. ROVER,
*United States Attorney.*
JOHN W. FIHELLY,
*Assistant United States Attorney.*

22 DISTRICT OF COLUMBIA, *ss:*

Patrick J. Hurley, as Secretary of War, being first duly sworn, deposes and says that he is one of the respondents named in the above entitled action, and that he has read the foregoing answer by him subscribed as Patrick J. Hurley, Secretary of War, and knows the contents thereof and that the matters and things therein, he verily believes to be true.

PATRICK J. HURLEY,
*Secretary of War.*

Subscribed and sworn to before me this 11th day of November, 1930.

[NOTARIAL SEAL.] FRANK M. HOADLEY,
*Notary Public, D. C.*

My commission expires June 24, 1935.

23 EXHIBIT "A".

Filed Nov. 12, 1930.

Copy.

War Department, Washington.

August 27, 1930.

DEAR MR. PEW:

I have read your letter of August 20th, in which you make the following statement:

"I understood you were going to advise me whether or not the President had any definite request that we do not go ahead with this proposition, as I had advised you if it was a matter which he considered of importance to the extent that it was conflicting with any plans he had, then, of course, we would drop the matter without further question. If this is not the case, we must decide promptly what we are going to do with regard to mandamus proceedings."

I have thought that the matter in controversy is rather a minor detail in which the President should not be involved. He, as you know, is the originator of the present building program in Washington, the beautification of the Potomac River, and the acquisition of parks suitable to the Capital of the nation. He must be, therefore, necessarily opposed to projects which will interfere with the consummation of this program.

The building program, the beautification of the Potomac River and its environs, and the acquisition of park land have in part already received the sanction of Congress. It is no longer merely an executive program. It is a policy of the Government. After having gone into the matter fully with yourself and your representative, and with Col. Ulysses Grant III, the Chairman of the National Park & Planning Commission, I have concluded that the development contemplated by you interferes with a public policy.

From my long acquaintance with you, personally, I know that you are broadminded and public spirited. Under all the circumstances involved in this matter, I hope that you will not pursue it further.

Sincerely yours,

PATRICK J. HURLEY,
*Secretary of War.*

Mr. J. Edgar Pew, Sun Oil Company, Philadelphia.

24 *Joinder in Issue.*

Filed Mar. 17, 1931.

* * * * * * *

The plaintiffs join issue upon the answers of the respondents Patrick J. Hurley, as Secretary of War, and Lytle Brown, as Chief of Engineers.

LONG, CHAMBERLAIN & NYCE,
COVINGTON, BURLING & RUBLEE,
*Attorneys for Plaintiffs.*

25 *Opinion.*

Filed Mar. 7, 1932.

* * * * * * *

This is a petition for a writ of mandamus to compel the Secretary of War and the Chief of Engineers of the War Department to issue a permit for the construction of a wharf in the Potomac River on the Virginia shore adjacent to the land owned by the relators.

On the 29th day of April, 1930, the relators, Lucien H. Greathouse and Rebekah S. Greathouse, through mesne conveyances from one Augustus S. Worthington, became the owners in fee simple of the land described in the petition "and including all accretions, land and all other riparian rights pertaining to any of land binding on the Potomac River, together with the improvements on said lot of ground and the rights and appurtenances thereto." This land is located in the State of Virginia, opposite to the District of Columbia.

Augustus S. Worthington derived title to the property by deed, dated June 16, 1892, from Henry H. Wells, trustee, and at that time and for some time prior thereto the northern boundary of the tract was the Potomac River. Since that time there has been a gradual and imperceptible increase to the land, either by alluvian or by the gradual and imperceptible receding or dereliction of the water.

26 Whatever the process, the gain to the land has been by little and little, and by small and imperceptible degrees.

By contract, dated June 24, 1929, the Sun Oil Company agreed to purchase of Charles H. Greathouse, the immediate grantor of the relators, the land described in the petition on the condition that the Federal Government would issue the necessary permit for the construction of a wharf out from and in front of said property into and in the Potomac River for the loading and unloading of tanks, barges, and like vessels. It was further agreed in said contract that said Charles H. Greathouse would make application for such permit at his own option either in his name or in the name of Sun Oil Company. This contract expired December 31, 1929, but in November, 1929, was extended to April 5, 1930, and it was agreed that the contract would be kept in force until final decision was had on the application for the wharf permit.

On October 24, 1929, the Sun Oil Company addressed an application to the Chief of Engineers of the United States Army for permission to construct a wharf into the waters of the Potomac River in front of the land described in the petition, and filed with it the necessary plans and specifications showing the details of construction of the proposed wharf.

Subsequent to the filing of the application for a permit to construct the wharf and on the 29th day of April, 1930, the said Charles H. Greathouse conveyed the land described in the petition to the relators herein, and these relators, by oral agreement with the Sun Oil Company, which was afterwards and on the 9th day of May, 1930, confirmed by written contract, continued in force the pending agree-
27 ment of said Charles H. Greathouse and the Sun Oil Company to August 1, 1930. On August 1, 1930, the relators entered into a further contract with the Sun Oil Company wherein they extended the date for the final termination of the agreement to April 30, 1933, and agreed that the purchase of the property by the Sun Oil Company "is *expressly conditioned* upon the granting prior to April 30, 1933, by the properly constituted authorities such permits and permission as are legally necessary for the construction of requisite wharves, piers, pipe lines and moorings, out, from and in front of said property into and in the Potomac River for the loading and unloading of tank barges and other like vessels."

The relators further agreed to continue their efforts and make every further reasonable endeavor to deliver or cause

to be approved, assigned and delivered to the Sun Oil Company permit or permission to construct the wharf by prosecuting to the courts of last resort, if necessary, their right to said permit or permission. It was also provided that the relators "shall have all benefits and inchoate rights resulting from the efforts of party of the second part (the Sun Oil Company) to obtain permits."

The defendant, Lytle Brown, as Chief of Engineers of the Army, held a hearing on the application for a permit to construct the wharf and considered the plans and matters brought out at the hearing. He found, and properly so, that the proposed structure would not obstruct navigation in the waters of the Potomac River; and, on August 7, 1930, recommended to the defendant, Patrick J. Hurley, the Secretary of War, the approval of the plans as set forth
28 in the application, and further recommended that the construction of the wharf be permitted in accordance with the provisions of Section 10 of the Act of Congress, approved March 3, 1899, entitled "An Act making appropriations for the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors and for other Purposes," being Section 403 of Title 33, U. S. C. A. On August 15, 1930, the defendant, Patrick J. Hurley, as Secretary of War, refused to authorize and issue the permit for the construction of the wharf. He bases his refusal to grant the permit on the ground of the public policy as set forth and declared in the Act of Congress, approved May 29, 1930, and entitled "An Act for the Acquisition, Establishment and Development of the George Washington Memorial Parkway along the Potomac from Mount Vernon and Fort Washington to the Great Falls, and to provide for the Acquisition of Lands in the District of Columbia and the States of Maryland and Virginia requisite to the Comprehensive Parkway, and Playground Systems of the National Capital."

This act authorized the appropriation of $9,000,000.00 for acquiring and developing, in accordance with the provisions of the Act of June 6, 1924, entitled, "An Act providing for a Comprehensive Development of the Park and Playground System of the National Capital," as amended, such lands as are necessary and desirable for the park and parking system of the National Capital in the environs of Washington and for the expeditious, econominal and efficient devel-

opment of the George Washington Memorial Parkway *on the shores* of the Potomac, and adjacent lands, from Mount Vernon to a point above the Great Falls on the Virginia side. The National Capital Park and Planning Com-
29 mission is authorized by this act to "occupy such lands belonging to the United States as may be necessary for the development and protection of said parkway and to accept the donation to the United States of any other lands by it deemed desirable for inclusion in said parkway."

The George Washington Memorial Parkway thus authorized will run along and upon the shores of the Potomac in front of the lands of the relators, and along and upon that part of the shore where the proposed wharf is to be constructed.

It is claimed by the relators that the Secretary of War acted without authority of law in refusing to approve and to grant a permit for the construction of the wharf and that such action on his part was unreasonable and arbitrary.

The relators base their right and the right of the Sun Oil Company to the permit on the grounds, first, that as riparian owners they have the vested right to construct the wharf under the Compact of 1785 between the States of Maryland and Virginia, and refer particularly to Article 7 thereof; and, second, that they have the vested right to construct the wharf under the laws of Maryland and Virginia now in force in the District of Columbia, and refer particularly to the Organic Act of 1801, continuing in force in the District of Columbia the laws of the States of Virginia and Maryland.

At the outset of this discussion it must be borne in mind that the Congress of the United States exercises exclusive jurisdiction of the territory embraced within the limits of the District of Columbia. *Art.* 1, *Sec.* 8, *Cl.* 17, *Constitution.* This territory is that portion of the territory of the United States ceded by the State of Maryland for
30 the permanent seat of Government of the United States including, the river Potomac in its course through the District and the islands therein, *Sec.* 1, *Chap.* 1, *Title* 20, *D. C. Code*, and extends to high-water mark on the Virginia shore, *Smoot Sand and Gravel Corporation v. Washington Airport*, 283 U. S. 348. The Potomac River

at the point here involved is wholly within the District of Columbia.

By the common law, the title in the soil of the sea, or the arms of the sea below high-water mark, except so far as private rights in it have been acquired by express grant, or by prescription or usage, is in the King, subject to the public right of navigation and fishing, and no one can erect a building or a wharf upon it without a license. In this country the title of the owner of lands bounding on a navigable river does not extend to the thread of the stream. *Shively v. Bowlby*, 152 U. S. 1. The relators here make no claim to the bed of the Potomac River and concede that the shores of this river are between high-water mark and low-water mark.

The United States upon acquiring territory, whether by cession from one of the States or by treaty with a foreign country or by discovery and settlement, take the title and dominion of lands below high-water mark of tide waters for the benefit of the whole people, and while they hold country as territory, the United States have all the powers born of national and municipal government, and may grant, for appropriate purposes, titles or rights in the soil below high-water mark of tide waters. *Shively v. Bowlby, Id.*

Therefore, the relators, conceding them to be ri-
31 parian owners, have no vested right to construct this wharf unless that right has been expressly granted to them either by the Compact of 1785 between Virginia and Maryland, or by virtue of the laws of Maryland and Virginia in force in the District of Columbia at the time of the Organic Act of 1801, or by act of Congress.

The compact between Maryland and Virginia was considered by the Supreme Court of the United States in Georgetown v. Alexandria Canal Co., 12 Peters 91. In that case Congress by Act of May 26, 1830, incorporated the Alexandria Canal Company and authorized that company to construct an acqueduct across the Potomac River. The appellants sought a perpetual injunction against the Canal Company to prevent the construction of the acqueduct. The lower Court refused to grant the injunction. It was urged on appeal that by the Compact of 1785 between Maryland and Virginia and by the act of cession of 1791, the free navigation of the River Potomac and the rights of the citizens of Maryland and Virginia, and of the District

were secured, and that the Charter authorizing the erection of works which disregarded the rights and property of the complainants is void, as against the Constitution of the United States because no compensation was provided for such injuries by the Charter.

Mr. Justice Barbour, speaking for the Court, and in disposing of the contention of the appellants, with respect to the Compact said:

"The compact made in the year 1785, between Virginia and Maryland, was made by the two states, in their character as stated. The citizens, individually, of both commonwealths, were subject to all the obligations imposed, and entitled to all the benefits conferred by that compact. But
the citizens, as such, individually, were in no just
32 sense the parties to it; those parties were the two
states, of which they were citizens. The same power which established it, was competent either to annul or modify it. Virginia and Maryland then if they had retained the portions of territory respectively belonging to them on the right and left banks of the Potomac, could have so far modified this compact as to have agreed to change any or all of its stipulations. They could, by their joint will, have made any improvement which they chose, either by canals along the margin of the river, or by bridges or acqueducts across it, or in any other manner whatsoever. When they ceded to congress the portion of their territory, embracing the Potomac River, within their limits, whatsoever the legislatures of Virginia and Maryland could have done by their joint will, after that cession, could be done by congress, subject only to the limitations imposed by the acts of cession. We are satisfied, then, that the act of congress, which granted the charter of the Alexandria Canal Company, is in no degree a violation of the compact between the states of Virginia and Maryland, or of any rights that the citizens of either or both states claimed as being derived from it."

The Compact between Maryland and Virginia was a regulation of commerce and its purpose was to open a route to the West and establish the Potomac River as a common highway for the purposes of navigation and commerce to the citizens of Virginia and Maryland. *Marine*

*Railway Co. v. U. S.*, 257 U. S. 42. The Compact gave the citizens of each State full property in the shores of the river adjoining their lands and the privilege of carrying out wharves and other improvements so as not to obstruct or injure the navigation of the river, but the Compact was abrogated so far as it affected this land by the act of cession from Virginia to the United States December 3, 1789, and it was not revived by the recession to Virginia July 9, 1846. *Evans v. U. S.*, 31 App. D. C. 544, 550; *Herald v. U. S.*, 52 App. D. C. 147. The original state of things was not changed by the grant of Virginia and the re-grant by the United States of the part of the District on the Virginia side. *Marine Railway Co. v. U. S., Id.* The
33 land belonging to the relators is in that part of Virginia which was ceded by Virginia to the United States to create the District of Columbia, and which was later receded to the State of Virginia. In the case of Evans v. U. S., supra, the plaintiff in error, Joseph Evans, was convicted in the Police Court of the District of Columbia for violating Sec. 896 of the Code of the District of Columbia, which made it unlawful for any person to fish with certain prohibited nets in the waters of the Potomac River and its tributaries within the District of Columbia. Evans was a citizen of Virginia and a resident of Alexandria County, and, at the time of the commission of the offense charged, fished from a rock on the Virginia shore opposite to the District of Columbia and above the high-water mark of the Potomac River.

Mr. Justice Van Orsdell, who delivered the opinion of the Court, took occasion to refer to the respective rights of the citizens of the States of Maryland and Virginia in the waters of the Potomac under the Compact of 1785. He pointed out that while certain rights were granted to the citizens of Virginia, yet nowhere did it appear in the Compact that the State of Maryland, either expressly or impliedly, granted away any title to the river or the soil under it, and his conclusion was that so far as the property right was concerned that such right did not exist in the river or in the soil under it, but in the privileges granted by the compact, so long as the States continued the agreement in force. The learned Justice, in reaching the conclusion that the Compact of 1785 was never in force in the District of Columbia, and that, therefore, Congress had the

right to enact the law under which the plaintiff in error was successfully prosecuted, said:

34 "The compact of 1785 never was in force in the District of Columbia. It was not a consideration in the acts of cession, either as to soil or the protection of the vested rights of citizens within the district ceded. It was not essential that it should be, as the entire river within the District of Columbia was under the control of the general government. The citizens of the District of Columbia on both shores enjoyed equal rights with respect to it. By the respective acts of cession, Maryland and Virginia relinquished their joint interests in, and control over, that portion of the river within the bounds of the District of Columbia. It was within the power of the States, under the compact, acting within the limitations of the Constitution, to jointly abolish or change its terms at any time. When they ceded a portion of their territory, including a portion of the river, to the United States, the legislative power that they possessed passed immediately to Congress; and Congress could no anything, in the exercise of its police power in the regulation of fishing in the Potomac River within the District, that they could have done. Congress, possessing this power, could legislate with respect to the terms of the compact, and the compact could not be invoked against any such act of Congress."

This Court is, therefore, of the opinion that the relators herein acquired no vested right by reason of Article 7 of the Compact of 1785 between the States of Maryland and Virginia to construct a wharf from their lands up to the navigable waters of the Potomac River. It therefore remains to be determined whether or not under the laws of either the State of Virginia or the State of Maryland in force at the time of the Organic Act of 1801 gave them such right.

We are not required to consider the laws of Virginia, for the reason that the power, authority and jurisdiction of that State ended at high-water mark on the Virginia side of the Potomac River. *Smoot Sand and Gravel Corporation v. Washington Airport*, 283 U. S. 348. The original state of things was not changed by the grant of

Virginia and the re-grant by the United States of
35 the part of the District of Columbia on the Virginia
side. That, at least, did not enlarge the rights of the State of Virginia, *Marine Railway Co. v. U. S., supra.* And as has been well said by Mr. Justice Van Orsdell in Evans v. U. S., supra, "the territory now embraced within the District of Columbia is co-extensive with that included in the cession of Maryland. Whatever title Maryland possessed in the soil became vested in the United States. Maryland, at that time, as we have observed, unquestionably owned the soil to the high-water mark of the Potomac River on the southern or Virginia shore. Congress has never relinquished the title or control thus acquired."

This brings us to a consideration of the law of the State of Maryland prior to the year 1801, relating to the right of riparian proprietors to wharf out. We have been unable to find any general grant of this right to riparian proprietors in force in the State of Maryland in 1801 or prior thereto. The laws in effect in that State in 1801 consisted entirely of private acts, giving the right to private parties under peculiarly existing circumstances to improve the water front upon which their lands were located. An examination of the legislation in Maryland from the very beginning of its existence as a Royal Province will show the following historical data on this subject:

The former proprietors of Maryland acquired the same right of disposing of land covered by navigable waters within the province of Maryland as the king had prior to the charter to Lord Baltimore in 1632, and according to Browne v. Kennedy, 5 H & J. 195, this right is now vested
in the state by reason of the acts of confiscation.
36 *Session of October,* 1780, *Chapters* 45, 49, 51 *Kilty's Laws of Maryland.*

The rights acquired by the Proprietary from the king were diminished only as follows:

1. After several acts of the Maryland Assembly, temporary in their nature, the first port law was effective. *Bacon's Laws, Chapter* 5, 1683, *Archives of Maryland* 1678-1683, *p.* 609; *also same Archives* 1693-1697, *p.* 279. This named the location of various ports none of which were within the present District of Columbia.

2. Supplementary acts naming other ports were passed. *Bacon's Laws, Chapter* 2, 1684, *Archives* 1684-1692, *p.* 111;

*Chapter* 2 *of* 1686 *Archives* 1684-1692, *p.* 132; *Chapter* 6 *Acts of* 1688 *Archives* 1684-1692, *p.* 218.

3. The first grant of land below high-water mark appears to be in the act relating to Oxford, which bounded the town therein provided for at low-water mark. *Chapter* 7 *of* 1695 *Archives* 1692-1697, *p.* 211.

4. Chapter 24 X of 1696, Archives 1693-1697, p. 498, related to the port of Annapolis, and declared that if the owners of the land in the port and town laid out and assigned for wharfage and building of keys, etc., neglect or refuse to build necessary wharves, etc., "for the propagation of trade * * * in eighteen months from the publication" of the Act, "it shall be lawful to and for any other person or persons to take up the same land assigned for wharves, keys and warehouses."

5. After prior acts providing for the laying out of the city of Baltimore and its addition to Jonestown, the Act of 1745, chapter 45 was passed. This is the authority
37 cited in a very considerable number of cases relating to wharfing rights in Baltimore.

6. Chapter 28 of the Acts of 1753 constitutes additional legislation for Charlestown in Cecil County, and was enacted for the encouragement of proprietors of water lots to build wharves and other conveniences for the better carrying on and promoting of trade in said town.

7. Chapter 25 of the Acts of 1751, related to Georgetown. Its landing place was on Rock Creek, where, by Chapter 14 of the Acts of 1745, provision was made for laying out a port occupying one acre from which tobacco might be exported.

By Chapter 45 of the Acts of November, 1784, the legislature of Maryland, in authorizing an addition to Georgetown stated the purpose of the Act as follows:

> And granting to those who shall be proprietors of the lots fronting on the North side of Water Street the exclusive rights to ground and water on the South side thereof for the sole purpose of making wharves, without being allowed to erect any building thereon, and vesting a power in the Commissioners of Georgetown to improve by wharves for the public good, the land and water fronting Frederick, Fayette and Hay Streets (Kilty's Laws).

Section 3 of this Act gave the proprietors of the lots fronting on the North side of Water Street the right to "have and enjoy the exclusive right to the ground and water on the South side of their respective lots for the sole purpose of making wharves, but they shall not be allowed to erect any buildings on the wharves so made by them."

8. By the cession act of 1791, Chapter 45, the Commissioners of the City of Washington were empowered to license the building of wharves in the Potomac and Eastern Branch adjoining the city. Similar powers were given the Commissioners and Port Wardens in connection with
38 points in Maryland specifically designated as ports.

As early as 1829, this matter of wharfing out in the Potomac River was presented to the Courts, and in the case of Kennedy v. The Corporation of Washington, 3 Cranch C. C. 595, the cession act of 1791 above referred to and Section 7 of the Charter of the City of Washington of May 15, 1820 were considered. In that case Kennedy moved the Court for a rule on the Mayor, Board of Aldermen and Board of Common Council of the City of Washington to show cause why *a writ of mandamus* should not issue to them commanding them to make such regulations as they might deem proper, prescribing the manner of erecting private wharves within the limits of the City of Washington. Kennedy had applied to the corporate authority of the city for leave to build a wharf on his lot and also for directions in regard to the plan and construction of the wharf, all of which they refused to give. By the Act of 1791 c. 45, Sec. 13, it was provided "that the Commission aforesaid" (of the City of Washington, appointed under the Act of Congress of the 16th of July, 1790, 1 Stat. at Large, 130) "for the time being, or any two of them, shall, from time to time, until the Congress shall exercise the jurisdiction and government within the said territory, have power to license the building of wharves in the waters of the Potomac, * * * but no license shall be granted to one to build a wharf before the land of another, nor shall any wharf be built in the said waters, without license, as aforesaid; and if any wharf shall be built without such license, or different therefrom, the same is hereby declared a common nuisance."

By the Charter of the City of Washington of the 15th of May, 1820, Sec. 7, the corporation has power, among

other things, "to preserve the navigation of the Potomac and Anacostia Rivers adjoining the city, to erect,
39 repair, and regulate public wharves, and to deepen creeks, docks and basins;" and "to regulate the manner of erecting, and the rates of wharfage at private wharves." It was contended by the respondents that the power given to the corporation was a power to be exercised or not at its discretion, and according to its discretion and it was further urged that the power of the Commissioners on this subject ceased to exist by its own limitations, by the assumption of jurisdiction by Congress on the 27th of February, 1801 (2 Stat. at Large, 103) and that the power given to the corporation, in relation to private wharves, was only to regulate the manner of erecting them, not to limit the extent of them or to interfere with the rights of the owners of land adjoining the river, and further that if they have the power under the Charter, it is a power to be exercised by them or not at their discretion. The Court refused to issue the mandamus for the reasons above stated.

There was no general law of the State of Maryland granting the right to a riparian proprietor to wharf out until the year 1862. In that year Maryland granted to the proprietor of land bounding on any of the navigable waters of the State the exclusive right to make improvements into the waters in front of his land and declared that these improvements were incident to the respective estates and should pass to the successive owners. *Section* 39, *Chapter* 129 *of the Maryland Acts of* 1862. This Act of 1862 obviously conferred no rights upon the relators herein and the case of B. & O. Railroad Co. v. Chase, et al., 43 Md. 23, cited by the relators, had to do with riparian rights in the city of Baltimore, defined by the Act of 1745, Chapter 45, hereinabove referred to, and the case of Garitee v. Baltimore, 53 Md. 422, likewise cited by the relators, considered and referred to the Act of 1862. The
40 rights of the upland proprietors, involved in these two cases, were valuable property rights. They were rights originating in statutes which gave the upland proprietor the right to wharf out in the navigable streams in Maryland. The statement of the Court in the case of Shively v. Bowlby, supra, that "In Maryland, the owner of land bounded by tide water is authorized, according to

various statutes beginning in 1745, to build wharves or other improvements upon the flats in front of his land, and to acquire a right in the land so improved," undoubtedly had reference not only to the Act of 1862, but also to these private and special acts.

In as much as the acts of Maryland prior to the Act of 1862 were acts for the benefit of private parties and to improve private lands at specific points and had no relation to any general authority in the upland proprietor to take possession of or exercise any dominion over navigable waters in the State of Maryland, the common law remained in force. This law gave to the owner of land fronting on a navigable river a right of access from his land to the river, but the right thus recognized, however, is not a title in soil below high-water mark, nor a right to build thereon, but a right of access only, analogous to an abutter upon a highway. *Shively v. Bowlby, supra.*

The Court is therefore of the opinon that under the law of Maryland, as it existed at the time of the Organic Act of 1801, the relators herein possessed no vested right to erect the wharf.

It having been concluded that the relators have no right neither at common law, nor under the Compact of 1785 between Maryland and Virginia, nor under the laws of Maryland as they existed at the time of the Organic Act
41 of 1801 to wharf out into the Potomac River in front of their land, it remains to be determined whether or not under Section 403 of Title 33, U. S. C. A. they have such right.

Neither this act nor any previous act relating to the erection of structures in the navigable waters of the United States manifested any purpose on the part of Congress to exercise the power to invest private persons with power to erect such structures within a navigable water of the United States wholly within the territorial limits of a State. *Cummings v. Chicago,* 188 *U. S.* 410. Nor has that power been exercised by Congress to invest private persons with the right to erect wharves within the Potomac River in the District of Columbia.

In the case of navigable streams wholly within the boundary of a State, the State has the power to regulate the construction and location of wharves in such streams, and, in such cases, a permit issued by the Secretary of War

is to be exercised subject to such rules and regulations as the State may prescribe. This was the situation in the case of Cummings v. Chicago, supra. There the appellants brought suit against the city of Chicago for the purpose of obtaining a decree restraining the defendant, its officers and agents, from interfering with the construction of a dock in front of certain lands, owned by the plaintiffs, and situated on the Calumet River, within the limits of that city. The plans of the plaintiff for the proposed dock were recommended by the Chief of Engineers of the Army and the Secretary of War granted permission for the construction of the dock. The ordinances of the city of Chicago required the permission of the Department of Public Works as a condition precedent to the construction of any dock within the limits of the city. It was held that the
42 plaintiffs, notwithstanding the permission from the Secretary of War to construct the dock, must also obtain permission of the Department of Public Works and therefore the bill was properly dismissed.

The Supreme Court in discussing the effect of this Act, Section 403, Title 33, U. S. C. A., at page 431 of the opinion said:

"The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the national government and the state government. The Secretary of War acting under the authority conferred by Congress may assent to the erection by private parties of such a structure, but without such assent the structure can not be erected by them. But under existing legislation they must, before proceeding under such authority, obtain also the assent of the State acting by its constituted agencies."

It is to be noted that here in the District of Columbia the United States owns the bed of the Potomac River and its shores between high-water and low-water mark. The Congress of the United States has full and exclusive power to legislate with respect to the property of the United States in the District of Columbia. It possesses the same power that the State has with respect to the navigable streams within its borders. By the Act of June 6, 1924, as amended

(Section 71, Title 40, U. S. C. A., and supplement) Congress created a commission to be known as the National Capital Park and Planning Commission, and designated the Chief of Engineers of the Army, as a member of that Commission. By Act of May 29, 1930, (Public No. 284, 71st Congress) Congress authorized the development and completion of the George Washington Memorial Parkway, which, as we have pointed out, was to include the shore of the Potomac and adjacent lands from Mount Vernon to a point above the Great Falls on the Virginia side, and specifically authorized the National Capital Park and Planning
43 Commission, of which the defendant herein, Lytle Brown, as Chief of Engineers of the Army, was a member, to occupy such lands belonging to the United States as may be necessary for the development and protection of said parkway. This certainly prohibits the use and occupancy of the shores of the Potomac River within the District of Columbia for any other purpose. It is conceded that this parkway will pass over and along the shores of the Potomac River in front of relators' property. The proposed wharf, if constructed, will necessarily have to be removed before the parkway can be extended over and along that point. This is the situation that confronted the Secretary of War when he was called upon to grant permission for the construction of this wharf.

The Congress of the United States, in the exercise of its exclusive jurisdiction, has set aside property of the United States fronting on the lands of these relators for a specific and definite purpose. If this Court should grant the prayer of the petition and issue its writ of mandamus today, then tomorrow the proper authorities of the Government may successfully invoke our aid to prevent the construction of the wharf. The Court is therefore asked to do a futile thing, if not to compel a wrongful act. Mandamus is a discretionary remedy, largely controlled by equitable principles; it will not be granted to promote a wrong—to direct an act which will work public mischief; or which, while within the letter, disregards the spirit of the law. *Duncan Townsite Company v. Lane*, 245 *U. S.* 308, *affirming* 44 *App. D. C.* 63. Mandamus will not be granted to compel a futile

act. *City of Boulder v. Lewis*, 21 *Fed.* (2d) 910, 912;
44 *U. S. v. Lapp*, 224 *Fed.* 377, 380; *In re Welch Manufacturing Company*, 201 *Fed.* 519, 520.

In the case of the City of Boulder v. Lewis, supra, there was a petition for leave to file a petition for mandamus against Judge Lewis to compel him to grant an appeal from an order in an equity cause. The questions sought to be raised by the appeal had become moot. It was held that mandamus would not be granted to determine purely moot propositions of law. In the case of U. S. v. Lapp, supra, a deputy marshal, whose appointment had been revoked by the marshal, sought by writ of mandamus to compel the marshal to reinstate him. The Court denied the writ because the allowance of it would have been fruitless "since it could have been voided by the marshal through mere demand of a bond and notice that the appointment would, upon presentation of the bond, be revoked." In the case of In re Welch Manufacturing, supra, the Company petitioned for a writ of mandamus to direct the Judge of the District Court for the District of Massachusetts to compel the witness to answer certain questions put on cross-examination in an equity suit pending in the Court for infringement of a patent. The writ was denied, and the Circuit Court of Appeals held that inasmuch as the questions were immaterial and inconsequential, and that on ultimate appeal from a decision of the District Court on the merits of the bill they would not be considered and, therefore, of no effect, "it would be absurd that this Court should proceed here to a judgment which hereafter it would be sure to determine was ineffectual for any practical purpose."

45 The petition for the writ of mandamus is denied, and to this ruling the plaintiffs are allowed an exception.

O. R. LUHRING,
*Justice.*

46 Supreme Court of the District of Columbia.

Thursday, March 24, 1932.

Session resumed pursuant to adjournment, Justice O. R. Luhring presiding.

* * * * * * *

This cause came on to be heard and was tried and submitted, and after consideration it is by the Court this 24th day of March, 1932,

Ordered, That the petition of the United States of America on relation of Lucien H. Greathouse and Rebekah S. Greathouse be and the same is hereby dismissed, and the rule discharged and the respondents may have their costs, to which the said petitioners except and from which order the said petitioners by their attorneys give notice of appeal in open court, and it is

Further ordered, That the appeal cost bond be and the same is hereby fixed at One Hundred Dollars ($100) or Fifty Dollars ($50) cash, deposited with the clerk of this Court.

*Memoranda.*

March 30, 1932.—$50 deposited in lieu of Appeal Bond.
April 6, 1932.—Proposed Bill of Exceptions filed.

47 *Assignments of Error.*

Filed Apr. 6, 1932.

* * * * * * *

Now come the plaintiffs and assign as error the action of the Court in the following matters:

1. The Court erred in holding that the petition could not be maintained on behalf of the relators upon the facts as found by the Court.

2. The Court erred in holding that the petition could not be maintained on behalf of the relators upon all of the evidence in the case.

3. The Court erred in not issuing the writ as prayed in the petition.

4. The Court erred in dismissing the petition.

5. The Court erred in refusing to admit in evidence proof of the fact that a permit had been issued by the Chief of Engineers on October 16, 1924, to construct a wharf in the Potomac River in front of the land immediately adjoining the Greathouse property.

6. The Court erred in refusing to admit evidence that the Board of Supervisors of Arlington County had given permission to erect tanks on the Greathouse property upon application by the Sun Oil Company.

7. The Court erred in admitting evidence of matters which were taken under consideration by the Secretary of

War in his refusal to issue the permit involved in this case other than matters connected with navigation.

8. The Court erred in admitting in evidence defendants' Exhibit 3, consisting of a resolution of the National Capital Park and Planning Commission purporting to take
48 possession of part of the property involved in this suit.

CHESTER S. LONG,
PETER Q. NYCE,
JOHN MARSHALL,
SPENCER GORDON,
S. W. McINTOSH,
*Attorneys for Plaintiffs.*

Received a copy of the foregoing assignments of error this 6th day of April, 1932.

LEO A. ROVER,
*U. S. Attorney for the District of Columbia.*

Supreme Court of the District of Columbia.

Wednesday, April 27, 1932.

Session resumed pursuant to adjournment, Honorable O. R. Luhring, Justice, presiding.

* * * * * * *

Come now the parties hereto by their respective attorneys of record, and thereupon, plaintiffs by their attorney of record submit to the Court the Bill of Exceptions taken at the trial of this cause and pray that the same be signed and made of record *nunc pro tunc*, which is hereby accordingly done.

49 *Designation of Record.*

Filed Apr. 6, 1932.

* * * * * * *

The Clerk will please prepare the record on appeal in the above entitled cause, and include therein the following:

1. Petition and exhibits.
2. Rule to show cause.
3. Answers of both defendants.

4. Joinder in issue.
5. Opinion of Court.
6. Judgment of Court, including notation of appeal and order fixing undertaking on appeal.
7. Memorandum of deposit of Fifty Dollars ($50) in lieu of undertaking on appeal.
8. Assignment of errors.
9. Memoranda of filing and submission of bill of exceptions and of approval of same.
10. Bill of Exceptions.
11. This designation.

CHESTER I. LONG,
PETER Q. NYCE,
JOHN MARSHALL,
SPENCER GORDON,
S. W. McINTOSH,
*Attorneys for Plaintiffs.*

Received a copy of the above designation —— —, ——.
LEO A. ROVER,
*U. S. Attorney for the District of Columbia.*

50 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
*District of Columbia, ss:*

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 49, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 78662 at Law, wherein The United States of America on relation of Lucien H. Greathouse et al. are Plaintiffs and Patrick J. Hurley, as Secretary of War et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 10th day of May, 1932.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
*Clerk,*
By CHAS. B. COFLIN,
*Assistant Clerk.*

51 In the Supreme Court of the District of Columbia.

At Law.

No. 78662.

UNITED STATES OF AMERICA ex Rel. LUCIEN H. GREATHOUSE and REBEKAH S. GREATHOUSE, Plaintiffs,

v.

PATRICK J. HURLEY, as Secretary of War, and LYTLE BROWN, as Chief of Engineers, Defendants.

*Bill of Exceptions.*

Be it remembered that this case came on for hearing January 25, 1932, before Mr. Justice Luhring to try the issues herein.

By consent of counsel the petition was amended as follows:

At the beginning of the description of the real estate in Paragraph 3, the words—

"thence north 61° 22′ 30″ west 100 feet to a point; thence south 13° 45′ west 225 feet to the Potomac River"

were amended to read:

"thence south 61° 22′ 30″ east 100 feet to a point; thence north 13° 45′ east 225 feet."

In Paragraph 4 the date "the 20th day of August, 1929," was amended to read "the 24th day of June, 1929". By consent it was ordered that the answers stand to the petition as so amended.

At the opening of the case the following agreement was made by counsel: Counsel for the defendants admits that the construction of the wharf, fender piles, etc., as applied for which is involved in this case will not obstruct navigation, and says that the decision of the Secre-

52 tary of War declining to authorize such construction was not by reason of any matter connected with navigation, but that the only thing that the Secretary had in mind was that the project was against public policy and

particularly opposed to the program contemplated by the Crampton Act and the proposed George Washington Memorial Parkway.

Counsel for the defendants also admitted that the answer of the defendant General Lytle Brown is correct and that the statements therein made may be used against both defendants.

There was introduced in evidence as plaintiffs' Exhibit 1 a deed dated April 29, 1930, from Charles H. Greathouse and Mary C. Greathouse to Lucien H. Greathouse and Rebekah S. Greathouse. The description contained in this deed included the land described in the petition as amended, and was followed by the statement:

"and including all accretions, land and all other riparian rights pertaining to any of land binding on the Potomac River."

This deed had attached thereto and made a part thereof a plat of survey, copy of which is attached hereto and made a part hereof.

There was introduced in evidence as plaintiffs' Exhibit 2 a deed dated December 13, 1921, from Augustus S. Worthington and Louise Worthington to Charles H. Greathouse. This deed included the land described in the petition—

"together with all the accretions, land and all other riparian rights, pertaining to any of the land herein described and binding on the Potomac River."

There was introduced as plaintiffs' Exhibit 4 a deed dated June 16, 1892, from Henry H. Wells, Trustee, to Augustus S. Worthington. This deed included the land described in the petition, together with other land adjoining. The description of the land in this deed was as follows:

53 "A certain tract of land in Alexandria County, Virginia, part of the Rosslyn Farm, so called, Beginning for the same at a large chestnut Oak tree, standing on the edge of the Potomac River bottom, said tree being called for in the survey of the Mason lands made by Lewis Carberry in 1857, being a corner to original lots numbered eleven (11) and twelve (12) of the subdivision of the Mason land into lots; and running from thence with the division

line between lots eleven and twelve (said division line being the east line of Division Street extended) South 0° 15½′ East 255.4 feet to the north line of Canal Street, thence along the north line of Canal Street extended S. 89° 13′ W. 1018.3 feet to a stone now planted; thence North 0° 47′ W. 89 feet to a point on the South 88° 30′ East line of the boundary extended, thence along this line reversed N. 88° 30′ W. 18.4 feet to a stone planted at the corner of lot numbered twelve (12) of the original tract; thence along said original boundary of said lot numbered twelve (12) N. 13° 26′ East 808.4 feet to the Potomac River; thence South 54° 21½′ East 1040.6 feet to the place of beginning containing twelve and forty one hundredths (12.41) acres (after deducting six-tenths (6/10) of an acre embraced in the County road running through a portion of the property) together with all the accretions, land, and all other riparian rights, pertaining to any of the land herein described and binding on the Potomac River, including all land lying between the above-described tract and said river (A) A survey and plat made by D. J. Howell, dated June 15, 1892, is made part hereof, and is to be recorded in the land records of Alexandria County, Virginia."

A copy of the plat and survey referred to as introduced in evidence as a part of said Exhibit 4 is attached to this bill of exceptions and made a part hereof.

By agreement of counsel it was admitted by the defendants that the wharf applied for was to be in front of the plaintiffs' land.

There was introduced in evidence as Exhibit 5 a certified copy of a dedication, dated September 22, 1860, by Richard Smith of certain land in Virginia, including the land in question, to which was attached a plat of survey made in the fall of 1835 and the spring of 1836 by Lewis Carberry, a copy of the material part of which is attached hereto and made a part hereof.

54 The deposition of Peter Q. Nyce on behalf of the plaintiffs was then read in evidence. Mr. Nyce identified the signatures on certain contracts which were put in evidence as follows:

Contract dated June 24, 1929, between Sun Oil Company and Charles H. Greathouse as plaintiffs' Exhibit 6. By this

contract Charles H. Greathouse agreed to sell to Sun Oil Company certain land, including the land described in the petition. The purchase price was to be $40,000, and the purchase was to be contingent upon—

"the issuance by the authorities of the Federal Government of such permits as are legally necessary for the construction of requisite wharves, piers, pipe lines and moorings out from and in front of said property into and in the Potomac River for the loading and unloading of tank barges and like vessels."

Charles H. Greathouse agreed in said contract that upon receipt of plans from Sun Oil Company he would make application for the permit "at his own option, either in his name or in the name of Sun". By its terms the contract was to expire December 31, 1929.

Contract dated November —, 1929, between Charles H. Greathouse and Sun Oil Company, as plaintiffs' Exhibit 7. By this contract the expiration date of the contract of June 24, 1929, was extended to April 5, 1930.

Contract dated May 9, 1930, between Lucien H. Greathouse and Rebekah S. Greathouse and the Sun Oil Company as plaintiffs' Exhibit 8. This contract described the land as set forth in Paragraph 3 of the petition, repeated the terms of the contract of Charles H. Greathouse with the Sun Oil Company, and extended the expiration date to August 1, 1930.

Contract dated August 1, 1930, between Lucien H. Greathouse and Rebekah S. Greathouse and Sun Oil Company as plaintiffs' Exhibit 9. By this contract the provisions
55 of the earlier contracts as to the sale of the land were repeated and the termination date was extended to April 30, 1933. This contract further provided:

"Second. (b) The purchase of the property outlined in this paragraph 'Second' hereinabove is *expressly conditioned* upon the granting prior to April 30, 1933, by the properly constituted authorities such permits and permission as are legally necessary for the construction of requisite wharves, piers, pipe lines and moorings, out, from and in front of said property into and in the Potomac River for the loading and unloading of tank barges and other like vessels.

"(c) Should the application for permits or permission to construct a wharf be not determined finally prior to April 30, 1933, then the parties of the first part hereby grant to second party the exclusive right and option to acquire the real and personal property described in this paragraph 'second' hereof for an additional period of three years from April 30, 1933, Provided that during such three year renewal period Second Party shall have the right on giving at least ninety days notice in writing previous to the end of any yearly period, to withdraw from the contract, but that at any time while such option is in force, party of the second part is obligated to purchase the property if all necessary permits and permissions described above are granted.

* * * * * * *

"Seventh. * * * Parties of the first part further agree to continue their efforts and make every further reasonable endeavor to deliver or cause to be approved, assigned and delivered to second party permit or permission to construct a wharf in the Potomac River opposite the land owned by parties of the first part by prosecuting to the courts of last resort, if necessary, their right to said permit or permission. Parties of the first part shall have all benefits and inchoate rights resulting from the efforts of party of the second part to obtain permits" (Exhibits 7, 8, 9, testimony Rebekah S. Greathouse, 37, 38, 39).

Mr. Nyce further testified that Charles H. Greathouse is the father of Lucien H. Greathouse, the relator in the suit; that the contract dated August 1, 1930, between Lucien H. Greathouse and Rebekah S. Greathouse and Sun Oil Company, introduced as plaintiffs' Exhibit 9, is in full force and effect; that Peyton S. Cochran prior to the time
56 of the suit has generally represented Sun Oil Company in their dealings with the Greathouses, in their dealings with the War Department, and the witness thinks he also had some negotiations with the Park and Planning Commission in the early stages, that Peyton S. Cochran was authorized to do that.

Upon cross-examination by Mr. Fihelly Mr. Nyce testified that Mr. Cochran is still with the Sun Oil Company

and still functions in the District of Columbia, that he was active during the time that witness was applying for the permit before the War Department.

Q. Do you know why it was, Mr. Nyce, that the Sun Oil Company did not file this suit rather than Mr. and Mrs. Greathouse? A. Under the terms of the agreement the responsibility of bringing suit was placed upon the Greathouses and the Sun Oil Company is abiding by the terms of that agreement.

The witness stated that he referred to the last agreement, and he pointed out Paragraph 7 of the contract of August 1, 1930, which has been quoted above in this bill of exceptions. He stated that the application of the Sun Oil Company for a permit was before the Secretary of War or the Chief of Engineers and had not been acted on by these officials on August 1, 1930.

**Rebekah Scandrett Greathouse**, being called as a witness for the plaintiffs testified that she is one of the relators in the case, that she is an attorney and has been one since 1925, that she represented Mr. Charles Greathouse in negotiations with the Sun Oil Company April 5, 1930, and before that time, that she is familiar with the application that was being made to the Chief of Engineers
57 for a wharf on the Greathouse property, that Mr. Cochran was the manager of the Sun Oil Company, that she had her dealings with Mr. Cochran as agent in fact of the Sun Oil Company, that she is familiar with the four contracts that were introduced with the testimony of Mr. Nyce, that she is familiar with the fact that there is an intervening period of about one month between the second and third contracts, that prior to the expiration of the second contract that Mr. Greathouse made she had an arrangement with Mr. Cochran as representative of the Sun Oil Company that these contracts would be kept in force until such time as final decision was reached in the matter, that this was an agreement between Mr. Greathouse and the Sun Oil Company represented by the witness and Mr. Cochran, that by "final decision" she meant final decision by the courts, or until the matter was disposed of altogether, that after the deed from Mr. Greathouse, Sr., to the witness and her husband they continued in force the

same agreement that had been pending before, that this was confirmed by the first written contract of the witness and Mr. Lucien Greathouse with the Sun Oil Company, that when they acquired the property the agreement of Mr. Charles H. Greathouse to sell was still in force, that Lucien H. Greathouse, the relator, is the husband of the witness, that they are the same Lucien H. Greathouse and Rebekah S. Greathouse mentioned in the deed from Charles H. Greathouse, that they have never conveyed the property to anyone else since they got that deed, that they have no knowledge of any of their predecessors in interest having ever transferred any of this property or rights appertaining thereto to the United States or to any other body politic, that at the present time Mr. Lucien Greathouse is conducting a coal business on the property, that there is a sidetrack there and he has a coal yard where he brings in coal and loads his coal, and a small office across the road
58 and he sells coal and delivers it from there, that he began doing that before the witness and Lucien H. Greathouse actually bought the property under lease from his father and that he has been doing that ever since they owned it, that shortly after Mr. Charles Greathouse bought the property he built a service station on the property and conducted the business for some time, that the property that Mr. Charles Greathouse owned was just about twice as large as the property that the relators now own, that the service station was on the part that the relators bought, that Mr. Greathouse, Sr., built a road down to the river flat, that there is quite a precipice there and part of the land is a good deal lower, and he constructed a road to get access to that lower part, that it has never been completed but the grading is done.

On cross-examination Mrs. Greathouse testified that the coal yard and the filling station were not close to the water, that they are on the same property, that they are on a hill and the river is some distance down below, that the two businesses were near the street.

The relators then offered in evidence as Exhibits 10 and 11 two certificates which showed that permission had been granted by the Supervisors of Arlington County to erect tanks on the property. Upon objection by the defendants these exhibits were excluded as irrelevant, and an exception was allowed.

The defendant **General Lytle Brown** was called as a witness on behalf of the plaintiffs, and testified that he is Chief of Engineers, United States Army, that he was the Chief of Engineers to whom application was made for a wharf opposite what is known as the Greathouse property on the Virginia side of the Potomac River, that he held a hearing on this application and passed on the application in his official capacity.

59 By the Court:

Q. This is a navigable stream, is it? A. Yes, sir.

There was introduced as plaintiffs' Exhibit 12 the recommendation of General Lytle Brown as Chief of Engineers to the Secretary of War. This was in words and figures as follows:

"7510. (Sun Oil Company.) 48.

Subject: Application for Permit to Construct Wharf and Fender Piles in Potomac River About 400 Yards Above Key Bridge, Near Rosslyn, Va.

1*st Ind.*

"Office C. of E., August 7, 1930.

To the Secretary of War:

"1. The Sun Oil Company of Baltimore, Maryland, has made application for permission, under Section 10 of the River and Harbor Act of March 3, 1899, to construct a wharf in the Potomac River at a site on the Virginia shore just above the Key Bridge. The purpose of the wharf is to furnish access by water to the development which the company proposes on the shore.

"2. A public hearing to consider this application was held by me on May 9, 1930, at which time a strenuous opposition to the issuance of a permit was made. The opponents are fearful that the development ashore to be served by the wharf will destroy the scenic beauty of the Potomac and will also interfere with the proposed George Washington Memorial Parkway recently authorized by Congress. Protests have been received from the National Capital Park and Planning Commission, the Fine Arts Commission, in-

dividual Members of Congress, and local residents in the vicinity of the development.

"3. However, there has not been a single objection to the construction of the wharf from the standpoint of navigation. In an analogous situation, the Attorney General, in an opinion, April 6, 1909, held that the Chief of Engineers and the Secretary of War should not consider objections which do not directly relate to navigable waters and their use for interstate and foreign commerce; and that such objections should not prevent the approval of the plan, provided it would otherwise have their approval. Accordingly, since the protests which have been made in this particular case are not based on the effect which the proposed wharf may have on navigation, they do not in my opinion justify withholding approval of the application.

"4. Some objection has been made as to the ownership of the bed of the Potomac River, it being contended that the Sun Oil Company not being the owner thereof has no right to build the wharf out into the river. This
60 phase of the matter does not require any special consideration as the Supreme Court of the United States has held that a permit issued by the War Department does not give any property rights either in real estate or material or any exclusive privileges; that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State or local laws or regulations, nor does it obviate the necessity of obtaining State assent to the work authorized. The Sun Oil Company has secured all the authority that is necessary to build its establishment on the shore in Virginia.

"5. This application has been before this Department since October, 1929, during which time it has been given very careful consideration. The data submitted by both proponents and opponents have been thoroughly studied and after mature deliberation I have come to the conclusion that my power under the existing law, Section 10 of the River and Harbor Act of March 3, 1899, precludes me from taking into consideration the objections raised by the opponents with a view to withholding approval of the application solely upon the grounds of such objections. Further delay on my part would be an abuse of my authority and a

deprivation of the rights of citizens under the law. The prevention of the proposed development in the interest of the beautification of the National Capital and its environs is a matter to be determined by other agencies.

"6. I therefore recommend that the construction of the wharf be authorized in accordance with the provisions of the aforementioned Section 10, subject to the conditions in draft of instrument which I have signed.

"LYTLE BROWN,
"*Major General, Chief of Engineers.*

"4 Inclos., viz., Permit, with Sub. 1 of Serial 61—tracing attached. Permit, with Sub. 2 of Serial 61—plan attached.

"Office Chief of Engineers, Aug. 18, 1930. Subs. 61/1-2, 48/2-3 accpg.

M. & R. Div., Aug. 15, 1930, Off. Sec. War.—Returned to Chief of Engineers without approval of Sec. War."

With this application was a form of permit to the Sun Oil Company of Baltimore, Maryland, to construct a wharf and fender piles in the Potomac River about 400 yards northwest of Key Bridge near Rosslyn, Virginia.
61 This permit was signed August 7, 1930, by Lytle Brown, Major General, Chief of Engineers, and bore a space for signature by the Secretary of War and was not signed by the Secretary of War.

On cross-examination General Brown produced the application made for the permit, which was introduced as respondents' Exhibit 1, as follows:

"District Engineer's Office,
United States Army,
Washington, D. C.

"GENTLEMEN:

"We request a permit for the construction of a wharf and fender piles as shown on the attached plan, to be built in the Potomac River approximately 400 yards above the Key Bridge at Rosslyn, Virginia. We own the land in front of which the wharf will be built.

Very truly yours,

SUN OIL COMPANY,
By J. N. PEW, JR.,
*Vice-President.*"

General Brown testified on cross-examination that the property is above Key Bridge, and that the plans as submitted to General Brown would not interfere with the navigation in the Potomac River.

**B. N. Smith,** being called as a witness for relators testified that he is in the real estate business, that he is forty-seven years old, that he lives at Arlington, Virginia, that he lived there when he was a boy, that he has lived there since he was about six years old, that as a boy he went down to the shores of the Potomac River and on the aqueduct bridge, that he was around there a good deal and that he has been there since frequently, that he is familiar with the piece of land on the Virginia shore above the present
62 Key Bridge that was known as the Worthington tract.

Q. Are you able to say from your observation, Mr. Smith, going through these years, whether or not any increase in that land out into the river was gradual or not? A. Well, it has been so gradual I never realized there had been any increase there.

Q. Then you would say it was gradual? A. Yes, very gradual.

That the tract that is spoken of as to the Worthington tract, the witness understands, part of it is the same as the present Greathouse tract.

On cross-examination Mr. Smith stated that he had been going over the old Aqueduct Bridge pretty frequently ever since about 1892, that he went back and forth to school, that he has never examined any surveys or maps with reference to this particular section of the river that we are concerned with, that he is not acquainted with what is known as the Carberry survey or map, that he has not examined any of the maps in the District Surveyor's office here in Washington or any of the maps of the Geodetic Survey with respect to the high water or low water mark on the river during the last fifty years or prior to that time.

Q. Have you ever made any personal examination of the shores of the river since 1892, with respect to what accretion has been made, if any? A. Well, I have made an examination. I have made an appraisal all along the river

banks, but I made no examination according to the accretion.

Q. You just appraised the river? A. Yes.

63 Q. You are not able to tell us during the last fifty years the extent of the accretion, if any, over this particular tract that we are concerned with, the Worthington tract, in front of that particular tract? A. No. I never realized there had been any accretion.

That he had not been aware of any change in the course of the river since Key Bridge was put up and erected, that he does not know that there has been any change above Key Bridge and right in front of this property, that he is not familiar with what the high water mark was on the river from 1792 on.

**Hilliard C. Myers**, being called as a witness for the plaintiffs, testified that he owns a tract adjoining the tract now held by Lucien Greathouse and his wife, that this tract was part of the original Worthington tract. There was then offered in evidence on behalf of the plaintiffs as Exhibit 13 a letter from J. A. O'Connor, Major, Chief of Engineers,

64 on the letterhead of the War Department, to H. C. Myers, and an attached permit to construct a pile and timber platform with a canoe house, runway and float in the Potomac River at Rosslyn, Virginia, at a point about 1500 feet upstream from the Francis Scott Key Bridge, dated October 16, 1924, with plat attached. This was objected to as immaterial and was excluded, and an exception granted.

The plaintiffs then rested.

**Lieut. Colonel U. S. Grant, 3rd**, was called as a witness for the defendants and testified that he is the Director of the National Park and Planning Commission, chairman, a member and the executive officer, that he is also Director of Public Buildings and Public Parks, that he spoke to and discussed with the Secretary of War the matter of building the wharf applied for by Sun Oil Company.

Q. State whether or not at that time you discussed with him and showed him certain plans in connection with the

Crampton Act and the land over which and through which the park itself would go or would have to go.

Counsel for the plaintiffs objected to this question on the ground that any testimony relating to anything that the Secretary of War considered other than questions of navigation would be irrelevant. This objection was overruled and an exception granted. The witness thereupon continued his testimony as follows:

That he took up with the Secretary of War the plans that had been made for the development of this parkway on the basis of which the Crampton Act of 1930 was drafted, and showed him that the project which had been authorized would comprise not only the land to which the Government claimed title along the shore but also a portion of private property where the Sun Oil Company were planning to make their development, and that it was a very essential part to carry out the project because
65 it included a small valley that offered the best opportunity for a connection between the shore drive and the highway on the upper heights, and asked him or presented to him that the War Department should not grant a permit for a structure on land claimed by the United States which the United States was going to use for its own purposes and which our Commission was designated to so use and take possession of, that the general plan for the development of a parkway out of the Crampton Act is the same plan which is now in force, that there have been minor modifications in various places but no substantial modification, that a considerable portion of the Greathouse property was to be taken under those plans, in fact enough of it to indicate that the Government might have to buy most of it, nearly all, that it was part of the plan that there should be a road going all the way from the Highway Bridge along the shore to the Key Bridge and under the Key Bridge up to Chain Bridge, and that connection between that lower level park drive and the high level drive, or the county road I suppose it is coming into Rosslyn, could best be made up this narrow valley which lies within the limits of the Greathouse property, so that it was necessary for us not only to contemplate buying the part of the Greathouse property on the shore but we

would have to buy the upper part of it also, that the road would be located along the shore with space enough only between it and the shore to not make it too dangerous for people going over the edge, and not subjected to injury by the river, that it is on the Virginia side of the river, that a resolution was recently passed by the National Park and Planning Commission in connection with property in front of the Greathouse property and also as part of the plans which the witness has mentioned here in furtherance of the Crampton Act.

There was then introduced in evidence defendants'
66 Exhibit No. 3 over objection by the plaintiffs that said exhibit was immaterial, which objection was overruled and to which an exception was allowed. Said exhibit was in words and figures as follows:

"*Resolution Passed at the Regular Meeting of the National Capital Park & Planning Commission on September 24-26, 1931, Taking Possession of Certain Property Belonging to the United States Situated North of Key Bridge for the George Washington Memorial Parkway.*

"Whereas, under the Act of Congress dated June 6, 1924 and the Act of May 29, 1930, and other applicable Acts, Congress authorized, adopted and directed various provisions and requirements for the establishment, development and maintenance of the Park and Playground System of the National Capital, including a parkway as provided therein from Mount Vernon to Great Falls, on the Potomac River, and

"Whereas, under the provisions of the Act of May 29, 1930, this Commission was authorized to occupy such lands belonging to the United States as may be necessary for development and protection of the said parkway, and

"Whereas, the United States is the owner of various lands which will be occupied in whole or in part by or which are contiguous to the said parkway as defined and set forth in said Act, including portions of the bed of the Potomac River within the District of Columbia.

"Therefore this Commission upon investigation finds that the occupation of such lands, a full description of which is hereto attached and made a part hereof, is neces-

sary for the development and protection of the said parkway, and this Commission therefore in accordance with the authority granted it by Congress, does hereby take possession of, and occupy, the said lands hereinafter described by actual survey which will include to center of the line of channel of the Potomac River in the District of Columbia, for the various purposes and intents as set forth in the said Act of Congress, and that such possession and occupation thus referred to, be complete and exclusive, and that a copy hereof be posted upon each of the group parcels of land hereinafter described;

Parcel 5—North of Key Bridge.

"Beginning for the same at a point in the Westerly line of the United States Reservation situated in Rosslyn, Virginia, at the South end of the Francis Scott Key Bridge, said point being located North 3° 13′ 16″ East, 346.14 feet from the Southwest corner thereof; thence leaving the Westerly line of said United States Reservation, and running along the High-water line of 1863, as defined by United States Coast Survey chart number 910a, the following fifteen courses and distances:

67 "South 57° 37′ 11″ West, 32.41 feet; North 81° 54′ 23″ West, 49.08 feet; North 71° 59′ 57″ West, 70.96 feet; North 65° 45′ 32″ West, 366.09 feet; North 54° 24′ 58″ West, 93.49 feet; North 63° 06′ 26″ West, 115.74 feet; North 66° 27′ 37″ West, 145.07 feet; South 85° 53′ 16″ West, 47.55 feet; North 32° 48′ 38″ West, 57.47 feet; North 61° 13′ 40″ West, 85.12 feet; North 59° 45′ 28″ West, 92.46 feet; North 75° 37′ 34″ West, 104.13 feet; North 63° 04′ 22″ West, 183.26 feet; North 62° 37′ 17″ West, 185.84 feet; North 70° 52′ 30″ West, 121.91 feet to a point on the High-water line of 1931 of the Potomac River; thence leaving same and running due North 293.0 feet, more or less, to the maximum depth contour of the Potomac River, as defined by United States Coast and Geodetic Survey Chart 560, dated July, 1931; thence with same in a southeasterly direction to the intersection of same with the prolongation of the above mentioned Westerly line of the United States Reservation; thence with same South 3° 13′ 16″ West, 518.0 feet, more or less, to the High-water line of 1931 of the Potomac River; thence with the Westerly line of the

United States Reservation, South 3° 13′ 16″ West 53.55 feet to the point of beginning.

"I hereby certify that the above is a true and exact copy of a resolution passed by the National Capital Park and Planning Commission at its regular meeting held on September 25, 1931.

[SEAL.] "T. S. SETTLE,
"*Secretary.*"

The witness, Lieut. Colonel Grant, further testified that it was the intention to take possession of all of the land to which the United States had title between the privately-owned property and the center of the channel, that this land has been staked out, that copies of the resolution were ordered to be placed on the stakes within the area described in the resolution, and that the witness had a report that they had been placed, that the area in question was described and sent to the Attorney General for the purpose of having suits filed under the Act of 1912, that the witness thinks that this description was sent before January 10; that is his recollection.

Upon cross-examination the witness testified as follows:

By Mr. Gordon:

Q. In your conversations with the Secretary of
68 War, did you discuss with him the question of whether or not if the wharf were built it would prevent the Government from condemning the property with the wharf? A. I don't remember that that question arose. The question was that the wharf should not be allowed to be built on Government land which the Government wanted for its own purpose.

Q. In your discussions with the Secretary of War did you say anything about the proposed presence of the tanks? A. Yes. It was acknowledged that that would be an undesirable feature in many ways and would necessarily have its effect on the cost of the project; but, of course, that being on private property had nothing specific to do with the wharf. There was no way the Secretary of War that we saw could very well prevent the building of the tanks.

Q. Well, didn't you call to the attention of the Secretary of War the fact that if the wharf permit were not given, the tanks would not be built because they were to be connected with the wharf? A. I feel that is so speculative that it is not something that is easy to answer in evidence.

By the Court:

Q. The question is, did you discuss that feature of it with the Secretary of War? A. Yes, sir; it was mentioned—a possible influence of refusing the wharf permit was considered.

By Mr. Gordon:

Q. If the tanks were built it would increase the amount the Government would have to pay for the property, would it not? A. The Government when it condemned the property would have to buy the tanks.

69 Q. Did you mention that to the Secretary of War? A. I think that was mentioned.

The witness testified further that he did not obtain a permit from the Chief of Engineers and the Secretary of War to block the channel to the middle, that there is no intention of blocking it, that we are taking possession of it for this project but when anything that is proposed to be done that would affect navigation comes along, of course, we will consult with the Chief of Engineers, that we have made no application to the Chief of Engineers yet for any construction to the middle of the river, that there is an item in the Governor's budget in regard to an appropriation by the State of Virginia for its share of the park above Key Bridge, that this budget is before the Virginia Legislature now, that there has been no appropriation made, that the witness has a letter from the Governor that the item that the witness spoke of as being in the Governor's budget was $25,000 if Arlington County would match it.

**Charles William Eliot, 2nd,** being called as a witness for the defendants, testified that he has been the Director of Planning to the National Capital Park and Planning Commission since July, 1930, that previous to that he was City Planner to the same Commission since August, 1926, that

before and since the Crampton Act was passed the staff of the Commission has been engaged in the preparation of detailed plans for the parkway for the whole distance from Mount Vernon and Fort Washington to Great Falls, that the work has been followed by detailed surveys for a very large part of that territory, including triangulation, some property surveys and some contour surveys, that negotiations have been entered into with a very large number of property owners to the land purchasing officer of the Commission, that in the case of the negotiations, to further them, a special association known as the George
70 Washington Memorial Parkway Association has been organized as a non-profit incorporated agency in the District of Columbia, that the Commission has received the cooperation of the Maryland legislature in so far as the strictly Maryland projects, exclusive of the Potomac, are concerned under the Crampton Act, that in the case of Virginia, as was already brought out, no act of the legislature has been passed, that the Act provides, however, that private parties may contribute as well as the states, and that is the reason why a private group has organized this Memorial Association to raise funds to match the Federal contribution, that Analostan Island is about the same distance below the bridge as the Greathouse property is above Key Bridge, that in pursuance of the Crampton Act the Roosevelt Memorial Association has acquired Analostan Island and has offered to donate it to the United States Government and the bill has been introduced in both Houses of Congress to accept it as a gift as a part of this project, that under the terms of the Crampton Act the Mount Vernon Memorial Highway is to become a part of this George Washington Memorial Parkway, that the Bureau of Public Roads which has the construction of that project has condemned some properties on the lower river for that work, that the witness knows of no case above Key Bridge where condemnation has been entered, that there has been none north of the Memorial Bridge, that Analostan Island was ordered condemned but the suit was withdrawn because of the action of the Roosevelt Memorial Association, that there is quite a tract at the Key Bridge head which is already in Government ownership, that the right of way for the new Memorial Highway is not less than 200 feet wide and extends, except at Alexandria and at

Wellington Ferry, to the river, that part of that property is not yet completely in Government control, and it is the understanding of the witness that the Bureau of
71 Public roads contemplates completion of that work, that the Memorial Highway is there for anybody to see, that under the provisions of the Crampton Act it is an integral part of the George Washington Memorial Highway, that it extends from the Memorial Bridge to Mount Vernon approximately fourteen miles and constitutes about a quarter of the total project for the George Washington Memorial, that it has been open for use on Sundays and on Saturday afternoons, that the witness understands it is to be open for all times about February 1, that it was open to the public for the first time a week ago Saturday.

**Hugh H. Stahl**, being called as a witness for the defendants, was shown defendants' Exhibit 3 and testified that he posted copies of the resolution contained in Defendants' Exhibit 3 on the Greathouse property, together with Mr. Settle and Mr. O'Brien, that Mr. Settle is the legal adviser (the witness is not sure) to the Commission, that the witness does not know whether Mr. Settle is the Secretary of the Commission or not.

By the Court:

Q. What did you do about notices on the Greathouse property? You didn't have to put them there. You weren't homesteading anything there, you know.

Mr. Fihelly: That is true, your Honor.

The witness continued his testimony by saying that they visited the Greathouse property and tacked these notices on stakes which had been driven in the ground, that the stakes were on the land, that the stakes were in a line deviating a distance of about seventy-five or a hundred feet from the present shore line of the Potomac River, that the stakes were not in a straight line, that the witness didn't place the stakes there, that they were placed there by the witness' office as being on the high water line of the Potomac
River of 1863, that there was land between this line
72 and the river that was not there in 1863, that the stakes referred to followed the meanderings of the river along the 1863 line.

By the Court:

Q. Did you see that old chestnut oak tree? A. No, sir.

Q. Is that still there? A. No, sir, that is not there.

Q. Is there any place to indicate where it was, any mark or stone? A. Well, it can be replaced by a survey, by using the distances in the deed. The same point can be reproduced.

The witness continued his testimony by saying that about three copies of the resolution were put up, maybe more, that he does not remember the exact number.

On cross-examination the witness testified that there were trees around the line where these notices were put, that he went among the trees to place his notices on the stakes, that the trees were not little bushes, that they were reasonably large, good-sized trees.

Thereupon the defendants rested.

The case was then argued and was submitted and taken under advisement by the Court.

Thereafter briefs were filed by the parties, and on March 7th, 1932, the Court filed an opinion reciting certain facts as found by the Court and holding that upon these facts the petition for the writ of mandamus should be denied. To this opinion and ruling the plaintiffs excepted. Thereafter, on March 24, 1932, the Court entered an order dismissing the petition and discharging the rule to show cause, to which order the plaintiffs excepted. All of the exceptions stated in this bill of exceptions were allowed and then and there entered upon the minutes of the Court. The
73 foregoing is the substance of all the testimony bearing upon the exceptions herein reserved on behalf of the plaintiffs.

And thereupon, and as said exceptions were duly noted and allowed as aforesaid as they were taken and duly entered upon the minutes of the Court, and because the matters and things hereinabove recited are not matters of record, in order to make the same a part of the record herein, which is hereby ordered, so that the plaintiffs may have their case reviewed on appeal, the plaintiffs by their attorneys move the Court to sign and seal this, their bill

of exceptions, to have the same force and effect as if each of said exceptions had been separately signed and sealed, which motion is granted by the Court, and thereupon the plaintiffs tender this their bill of exceptions and request the Court to sign and seal the same, which is accordingly done, now for then, this 27th day of April, 1932.

O. R. LUHRING,
*Justice.*

Approved.
CHESTER S. LONG,
PETER Q. NYCE,
JOHN MARSHALL,
SPENCER GORDON,
S. W. McINTOSH,
*Attorneys for Plaintiffs.*
LEO A. ROVER,
*United States Attorney.*

(Here follow plats marked pages 74, 75, and 76.)

Endorsed on cover: District of Columbia Supreme Court. No. 5692. The United States of America on relation of Lucien H. Greathouse and Rebekah S. Greathouse, appellants, vs. Patrick J. Hurley, as Secretary of War, and Lytle Brown, as Chief of Engineers. Court of Appeals, District of Columbia. Filed May 17, 1932. Henry W. Hodges, Clerk.

Tuesday, October 4th, A. D. 1932.

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No. 5692

THE UNITED STATES OF AMERICA on Relation of LUCIEN H. GREATHOUSE and REBEKAH S. GREATHOUSE, Appellants,

vs.

PATRICK J. HURLEY, as Secretary of War, and LYTLE BROWN, as Chief of Engineers

The argument in the above entitled cause was commenced by Mr. Chester I. Long, attorney for the appellants, and was continued by Messrs. J. W. Fihelly and Gustave A. Iverson, attorneys for the appellees, and was concluded by Mr. Chester I. Long, attorney for the appellants.

(Mr. Justice Van Orsdel not sitting.)

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Saturday, November 19th, A. D. 1932.

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No. 5692

THE UNITED STATES OF AMERICA on Relation of LUCIEN H. GREATHOUSE et al., Appellants,

vs.

PATRICK J. HURLEY, as Secretary of War, et al.

It is ordered by the Court that the above entitled cause be and it is hereby restored to the calendar for rehearing in due course.

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Monday, December 5th, A. D. 1932.

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No. 5692

THE UNITED STATES OF AMERICA on Relation of LUCIEN H. GREATHOUSE and REBEKAH S. GREATHOUSE, Appellants,

vs.

PATRICK J. HURLEY, as Secretary of War, and LYTLE BROWN, as Chief of Engineers

The re-argument in the above entitled cause was commenced by Mr. Chester I. Long, attorney for the appellants,

and was continued by Messrs. J. W. Fihelly and G. D. Iverson, attorneys for the appellees.

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Tuesday, December 6th, A. D. 1932.

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No. 5692

THE UNITED STATES OF AMERICA on Relation of LUCIEN H. GREATHOUSE and REBEKAH S. GREATHOUSE, Appellants,

vs.

PATRICK J. HURLEY, as Secretary of War, and LYTLE BROWN, as Chief of Engineers

The re-argument in the above entitled cause was concluded by Mr. Chester I. Long, attorney for the appellants.

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COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5692

THE UNITED STATES OF AMERICA on Relation of LUCIEN H. GREATHOUSE and REBEKAH S. GREATHOUSE, Appellants,

v.

PATRICK J. HURLEY, as Secretary of War, and LYTLE BROWN, as Chief of Engineers

Appeal from the Supreme Court of the District of Columbia

Argued December 5, 1932. Decided January 16, 1933

Chester I. Long, S. W. McIntosh, Spencer Gordon, of Washington, D. C., for appellant-.

Leo A. Rover, John W. Fihelly, Seth W. Richardson, Gustave A. Iverson, of Washington, D. C., for appellee-.

(Before Martin, Chief Justice; Robb, Van Orsdel, Hitz, and Groner, Associate Justices)

VAN ORSDEL, Associate Justice:

This appeal is from a judgment of the Supreme Court of the District of Columbia denying a writ of mandamus to

compel the Secretary of War to issue a permit for the construction of a wharf in the Potomac River on the Virginia shore, and within the limits of the District of Columbia. The permit was sought under the provisions of the rivers and harbors appropriation act of March 3, 1899, 30 Stats. 1151, as follows:

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

It is conceded that the wharf here sought to be constructed is not within the limits of any established harbor line. It likewise appears that the plans were approved and recommended by the Chief of Engineers and disallowed by the Secretary of War upon the stated ground that the allowance of the permit would be against public policy.

Appellants insist that by the terms of section 7 of the compact of 1785 between Maryland and Virginia they acquired such property rights in the waters of the Potomac on the Virginia shore as entitles them, as a matter of right, to a permit at the hands of the Secretary of War. Under this contention we are again confronted with the compact of 1785 between Maryland and Virginia, relating to the mutual use of the waters of the Potomac River, and whether or not this compact is in force in the District of Columbia. It has been decided so frequently by the courts that it is not in force in the District of Columbia as to almost render the question moot. Evans v. United States, 31 App. D. C.

544; Herald v. United States, 52 App. D. C. 147; Marine Railway Company v. United States, 49 App. D. C. 285, 257 U. S. 47; Smoot Sand & Gravel Corporation v. Washington Airports Corporation, 283 U. S. 348.

The Smoot case, among other things, finally fixed the boundary line between Virginia and the District of Columbia at the high-water mark on the Virginia shore. In the Marine Railway case the court, referring to the compact of 1875, said:

"Without going into the history of the compact or reciting it, we only need to remark that it was a regulation of commerce, and while with a view of opening up a route to the West it provided in article 6 that the Potomac should be considered as a common highway for the purposes of navigation and commerce to the citizens of Virginia and Maryland, and in article 7 gave the citizens of each State full property in the shores of the river adjoining their lands and the privilege of carrying out wharves, etc., with a common right of fishing, it left the question of boundary open to long-continued disputes. It may be laid on one side even if it ever was in force in the District of Columbia, which has been denied on the ground that the compact was abrogated so far as it affected this land by the grant of Virginia and was not revived by the grant of the United States. Evans v. United States, 31 App. D. C. 544, 550; see Georgetown v. Alexandria Canal Company, 12 Pet. 91."

In the Evans case, above cited with approval on the point that the compact was abrogated so far as it affected the District of Columbia by the grant of Virginia and was not revived by the grant of the United States back to Virginia, we said:

"The easements and privileges she possessed in the river, under the compact, were destroyed by the cession to the United States, and, having been lost, they could not be revived by the mere reconveyance of the territory ceded, unless expressly recreated in the act of retrocession. Regarding the easements and privileges granted in the compact, the act of retrocession is silent. There being no express revival, there could be no revival by implication."

Inasmuch as the compact was made between Virginia and Maryland acting in their character as States, the citizens

of these Commonwealths were not parties to the compact, and it remained within the power of the States, which established whatever rights inured to the citizens of either, to annul or modify the compact at will, consequently the exercise of sovereign authority over the compact, belonging to the States of Maryland and Virginia, passed to the United States with the cession to form the territory of the District of Columbia. Georgetown v. Alexandria Canal Company, supra.

With the cession there was a complete change of sovereignties. The United States superseded that of the States of Maryland and Virginia, and until it recognized the easements and privileges accorded the citizens of Virginia by the seventh paragraph of the compact, the compact became and remained inoperative within the District. Congress has never recognized in any respect the compact, or any rights under it. On the contrary it has by express legislation assumed absolute and complete jurisdiction and control over the Potomac River within the District to the high-water mark on the Virginia shore.

Article 7 of the compact provides as follows:

"The citizens of each State, respectively, shall have full property in the shores of the Potowmack River adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river."

It will be observed that the right to occupy the stream with wharves or other improvements is treated in the compact as merely a privilege in the nature of an easement that may be continued or destroyed by the joint action of the States at will. A riparian right only rises to the dignity of a vested property right in the stream when the title of the riparian proprietor extends to the bed of the stream. In that case the riparian right clearly is not an easement, as one can not have an easement upon his own land. The same would be true of navigable streams where the State has extended the rights of the riparian owner beyond the border of the stream. But this rule has no application here. The compact did not change the line between the States of Maryland and Virginia. It continued at high-

water mark, hence the "full property in the shores," mentioned in article 7, were not property rights in the sense that they vested a riparian owner with seisin or title to the bed of the river below high-water mark. The fee of the riparian owner in this instance stopped at the water's edge.

If the compact created in the citizens of Virginia a vested property right in the river, the authority of the States could not be exercised to its destruction without due compensation. But as we have observed, the privilege thus granted was subject to the will of the sovereignties of Maryland and Virginia as long as Maryland retained the title to the bed of the river and Virginia possessed merely the commercial rights granted under the compact; but when these sovereignties surrendered the territory composing the District of Columbia to the United States, all those rights and privileges passed to the new sovereign and were subject to its will and control, and until recognized by the United States they were extinguished. Not having been recognized, the act of recession to Virginia did not revive them.

It is urged by counsel for appellants that the Maryland act of March 12, 1786, by which the compact was ratified has not been repealed and became a law of the District under the organic act of 1801, D. C. Code, section 1636, continuing the laws of Maryland in force in the District of Columbia. The Maryland act merely imparted legal force to the compact, and since the compact, as ratified, never was in force in the District the act of ratification never became a part of the law of the District.

It seems to be conceded by counsel for appellant in this case that there is no vested property right in the river, since they endeavor to attach to their clients the rights accorded under the compact on the basis of riparian ownership. Nothing is better settled than the common-law rule that "the title and the dominion in lands flowed by the tide were in the King for the benefit of the Nation. Upon the settlement of the Colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established." Shively v. Bowlby, 152 U. S. 1, 57. This right of dominion and control by the sovereignty extends to the States and in the District of Columbia to the United States. It is of course within the sovereign power to regulate and control the shores of tide waters and the land under them as was exercised by the Crown of England.

"The State may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also, by the reclamation of submerged flats, and the erection of wharves and piers and other advantageous aids of commerce." Shively v. Bowlby, supra, 46.

Assuming, as we must, that the provision of the rivers and harbors act above quoted applies to the Potomac River within the District of Columbia, as to all other navigable waters of the United States, the only way that a riparian owner of land bordering upon the Potomac River can acquire a wharfage right is through a permit issued by the Secretary of War. Congress has conferred its unlimited discretionary jurisdiction in this particular to the Secretary of War, and in granting these permits he exercises the power that might otherwise be exercised by the sovereign. This brings us to the important point for consideration in this case, and upon which, regardless of the compact of 1785, we think the case turns—the discretionary power of the Secretary of War in refusing this permit.

To entitle appellants to a permit, it must clearly appear in this proceeding, not only that a positive ministerial duty is imposed upon the Secretary of War to issue the permit, but it must also appear that the appellants have a clear and unquestionable right to compel the performance of that duty by the Secretary. Appellants in their petition, among other things, allege:

"That on the 24th day of June, 1929, Charles H. Greathouse was the owner of the property described in paragraph 3 hereof, and on that date he entered into an agreement to sell said real estate to the Sun Oil Company, said sale being contingent upon the granting of permission to erect tanks, warehouses, and other equipment thereon, and the construction of requisite wharfs, piers, pipe lines, and moorings out from and in front of said property into and in the Potomac River for the loading and unloading of tanks, barges, and other light vessels; that under the terms of said agreement application for such permission could be made by the said Charles H. Greathouse at his option either in his own name or in the name of the Sun Oil Company."

It appears that the application for permit was originally made in 1929 by the Sun Oil Company in its own name, and

with the positive assertion of ownership of the property in question. It appearing upon investigation that the Sun Oil Company was not the owner of the property, but that its only interest arose out of the above contract, the Secretary of War refused the permit on October 15, 1930. So far as the record shows the Sun Oil Company at this point dropped out of the controversy.

It is further alleged in the petition:

"That on, to wit, April 29, 1930, the said Charles H. Greathouse conveyed the real estate herein described, and all rights under the agreement and application above referred to, to these plaintiffs. That on the 9th day of May, 1930, while said application was pending before the Chief of Engineers, plaintiffs entered into an agreement with the Sun Oil Company for the sale of said lands containing the same provisions as those in the contract of Charles H. Greathouse, hereinbefore described. Plaintiffs, under the terms of said agreement, and as owners of said real property, are entitled to all benefits and inchoate rights resulting from the efforts of the Sun Oil Company to obtain permits for such construction.

Appellants now contend that they have the right to take up the case where the Sun Oil Company left off, and that under the original contract they fall heir to all "benefits and inchoate rights" which the Sun Oil Company may have acquired. It is clear, therefore, that the present appellants are not the real parties in interest. They have no intention of constructing a wharf. Their interest and only interest asserted in this appeal is to secure a permit to enable them to sell their land. In the last analysis the permit is sought to promote a real estate speculation which at most amounts to a mere contingent expectancy that may or may not materialize. Appellants are not seeking to build a wharf for themselves nor to obtain a permit for themselves. The permit is for the Sun Oil Company. The contract provides, in substance, that if the permit given by the Arlington County officials for the erection of storage tanks on the upland is continued, and if the Secretary of War grants the permit for the erection of the wharf, then, and in that event, the Sun Oil Company will purchase the property.

It will be observed that these matters are conditional, contingent, prospective, and inchoate. It is elementary that the writ of mandamus will only issue for the enforcement of a right which is complete and not merely an inchoate right. High on Extraordinary Legal Remedies, sec. 10. In 38 Corpus Juris, page 586, section 57, it is said: "Mandamus will not issue to enforce a right which is conditional or incomplete by reason of conditions precedent which are still to be performed by the petitioner or the relator or which is contingent upon the further act of a third person or tribunal."

Section 10 of the rivers and harbors act, giving the Secretary of War power to authorize the erection of wharves in the navigable waters of the United States, is twofold. It forbids the issuance of a permit where the structure will interfere with navigation. In this aspect the Secretary has no discretion, except to determine whether such interference exists. On the other hand, the act confers discretion in the Secretary to grant or refuse permits where the structure will not interfere with navigation, and the Secretary in the exercise of that discretion may take into consideration the character of the structure sought to be built in any port or "where no harbor lines have been established," and in the determination of this matter the Secretary must take into consideration the "location" and the "condition" of the structure and its effect upon other structures or upon the "channel," or the normal flow of the stream. The Secretary may well have concluded that the structure of the wharf in question, a short distance above a bridge costing millions of dollars, would so alter or modify the course of the stream as to result in damage to the bridge. The Secretary is not required to state the specific grounds upon which his discretion is exercised, providing he is acting, as in this case, in a discretionary capacity. Discretionary power is jurisdictional and the court, in determining whether or not the decision of an official of the Government was within his discretion, will be guided not alone by the specific ground upon which the decision is based but broadly by an examination of the entire record in order to ascertain whether or not the action taken can be reconciled with the law conferring jurisdiction.

The "condition" that seems to have impelled the action of the Secretary in denying the permit grew out of the act of Congress of June 6, 1924, 43 Stat. 463, providing for the creation of a National Capital Park Commission, and the act of May 29, 1930, 46 Stat. 482, known as the Cramton Act, authorizing the development and completion of the George Washington Memorial Parkway. The court below in its opinion, in commenting upon the effect of these acts, said:

"By the act of May 29, 1930, Congress authorized the development and completion of the George Washington Memorial Parkway, which, as we have pointed out, was to include the shore of the Potomac and adjacent lands from Mount Vernon to a point above the Great Falls on the Virginia side, and specifically authorized the National Capital Park & Planning Commission, of which the defendant, Lytle Brown, as Chief of the Engineers of the Army, was a member, to occupy such lands belonging to the United States as may be necessary for the development and protection of said parkway. This certainly prohibits the use and occupancy of the shores of the Potomac River within the District of Columbia for any other purpose. It is conceded that this parkway will pass over and along the shores of the Potomac River in front of relator's property. The proposed wharf if constructed, will necessarily have to be removed before the parkway can be extended over and along that point. This is the situation that confronted the Secretary of War when he was called upon to grant permission for the construction of the wharf."

Appellants in their petition lay claim to the ownership of a strip of land on the Virginia shore between the high-water marks of 1863 and 1931, where gradual accretions have from time to time extended the shore line into the river, and that the land created by the accretions was conveyed to them by their predecessors in title. Defendant, Secretary of War, in his answer alleges:

"Further answering the petition, by way of a separate and distinct answer thereto, respondent states that he is informed and believes and therefore avers that the United States is the owner in fee of the south bank of the Potomac

River within the limits of the District of Columbia to the high-water mark of 1792 of the Potomac River."

The National Captial Park Commission on September 25, 1931, pursuant to the Cramton Act, took action in relation to the claim of the United States to the ownership in fee of the land created by accretion on the Virginia shore by the following resolution:

"This commission, therefore, in accordance with authority granted it by Congress, does hereby take possession of, and accupy, the said lands hereinafter described by actual survey, which will include to center line of channel of the Potomac River in the District of Columbia, for the various purposes and intents as set forth in the said act of Congress, and that such possession and occupation thus referred to be complete and exclusive, and that a copy hereof be posted upon each of the group parcels of land hereinafter described."

The lands claimed by accretion lying between the present high-water line of the river and that of 1792 are included in the lands described in the above resolution. It was conceded in the argument in this court that notices had been posted upon the lands, and that action has been taken in the Supreme Court of the District of Columbia to determine the title to these lands. In this situation it would seem that the issuance of a permit to construct the wharf would be an act of folly for the reason that, if it is found ultimately that the Government is not the owner of the land immediately adjacent to the river, provision has been made for its condemnation and ample funds appropriated under the parking act to acquire the lands adjacent to the river for parking purposes.

Clearly appellants have established nothing in the development of their case upon which a legal right to the writ of mandamus can be predicated, and there is nothing in the statute which reduces the duty imposed upon the Secretary to a mere ministerial act. The denial of the permit on the ground of public policy is, we think, fully supported by the record in this case.

The judgment is affirmed.

Josiah A. Van Orsdel, Associate Justice.

A true copy. Teste:

——, Clerk Court of Appeals, D. C.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5692

THE UNITED STATES OF AMERICA on Relation of LUCIAN H. GREATHOUSE and REBEKAH S. GREATHOUSE, Appellants,

v.

PATRICK J. HURLEY, as Secretary of War, and LYTLE BROWN, as Chief of Engineers, Appellees

GRONER, J., dissenting:

I cannot concur in the opinion of the court in this case. The appeal is from a decision of the lower court denying a writ of mandamus to compel the Secretary of War to issue a permit for the construction of a wharf in the Potomac River on the Virginia shore in front of the lands owned in fee simple by appellants. The permit was applied for under act March 3, 1899, sec. 10 (U. S. C. A., Tit. 33, ch. 9, sec. 403, p. 397). The act will be found copied in full in the opinion of the majority.

The Chief of Engineers, after hearing and examination of the plans and specifications, decided that the proposed structure would not obstruct navigation in the waters of the Potomac River and recommended the granting of the permit. The Secretary of War, though admitting that the proposed wharf would not obstruct navigation, declined to grant the permit on the sole ground that the construction of the wharf might interfere with the plans of the commission appointed under the provisions of the act of Congress of May 29, 1930, known as the Cramton Act (46 Stat., ch. 354, p. 482), in the subsequent establishment of the proposed George Washington Memorial Parkway along the Potomac to Mount Vernon and above Washington to Great Falls. On the other hand, appellants insist that as the owner of a part of the bank of the river on the Virginia side, they have, under the compact of 1785, the right to build a wharf, subject only to the condition that the same is not detrimental to the public interest in the navigation of the river.

The compact of 1785 was entered into between commissioners appointed by Maryland and Virginia. In its

broader aspects it was a regulation of commerce with a view to opening up a route to the West. It provided that the Potomac should be considered as a common highway to the citizens of both States for the purpose of navigation and commerce. Marine Ry. v. United States, 257 U. S. 47. It did more than this, however, for it fixed the respective property rights of the owners of land along the river on either side to the use and enjoyment thereof as follows:

"Seventh. The citizens of each State, respectively, shall have full property in the shores of Potowmack River adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river." * * *

The compact was duly ratified by each Commonwealth. (1 Dorsey, Md. Laws, 1692-1837, p. 187; 12 Hening, Va. Stat. p. 500). And the rights thus secured, the two Commonwealths, by act of general assembly of each, solemnly pledged their faith should never be repealed or altered without the consent of the other. In 1789 and 1791, respectively, Virginia and Maryland ceded to the United States the territory which became the District of Columbia. In each act of cession (Burch's Digest, p. 213; Md. act, 1791, ch. 45) there was a proviso as follows:

"Nothing herein contained shall be construed to vest in the United States any right of property in the soil, or to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States."

In 1846 there was a recession to Virginia of the territory ceded by her to the United States, and this act (9 Stat. 35, ch. 35) provided:

* * * "All the rights and jurisdiction therewith ceded over the same, be, and the same are hereby, ceded and forever relinquished to the State of Virginia, in full and absolute right and jurisdiction, as well of soil as of persons residing or to reside thereon." * * *

We have, therefore, here a case in which the owner of land formerly in Virginia, then in the District of Columbia,

and by re-cession now in Virginia, binding on the Potomac River, and which by accretions has been extended from its original shore line out into the river beyond the original high-water line, claims the right, under the compact, of access to the navigable part of the river and the right to the use of the soil under the river between his land and the line of navigability whereon to erect a wharf.

Since the answer depends on the rights granted under the compact, it is unnecessary to refer to established principles with relation to the rights ordinarily of a riparian owner on a navigable waterway, except to note that both in Maryland and in Virginia from early colonial times the right to wharf out has always been recognized as an incident of such ownership. See McCready v. Virginia, 94 U. S. 391; Shively v. Bowlby, 152 U. S. 1; Groner v. Foster, 94 Va. 650; and U. S. v. Chandler-Dunbar, 229 U. S. 53. If, therefore, the effect of the compact between Virginia and Maryland was to create a property right or even a franchise in the owners of lands on the Virginia side binding on the Potomac River to have access to the channel line for the building of wharves, and if such right was not affected by the cession or recession (as the Supreme Court in terms has declared it was not, Marine Ry. v. U. S., supra, p. 63), the right of appellants to have the permit applied for, as I view it, is unquestionable. While the precise point has never been decided, several cases in the Supreme Court throw light upon it, and it is proper to consider these cases.

The first that need be noted is Maryland v. West Virginia, 217 U. S. 577. After the original decision, 217 U. S. 1, counsel for the two States submitted drafts of a decree to be entered in the case, and this brought to the attention of the court for the first time the question whether the boundary line in the Potomac River between the two States should be at high-water or low-water mark on the West Virginia side. In its supplemental opinion, 217 U. S. 577, the Supreme Court quotes the report of the arbitrators (re the Maryland and Virginia line) as follows:

"Taking all together, we consider it established that Virginia has a proprietary right on the south shore to low-water mark, and, appurtenant thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership,

and which shall not impede the free navigation or other common use of the river as a public highway."

And with reference to this, Mr. Justice Day, who wrote the opinion, said:

"The compact of 1785 * * * is set up in this case, and its binding force is preserved in the draft of decrees submitted by counsel for both States. We agree with the arbitrators in the opinion above expressed, that the privileges therein reserved respectively to the citizens of the two States on the shores of the Potomac are inconsistent with the claim that the Maryland boundary on the south side of the Potomac River shall extend to high-water mark. There is no evidence that Maryland has claimed any right to make grants on that side of the river, and the privileges reserved to the citizens of the respective States in the compact of 1785, and its subsequent ratifications, indicate the intention of each State to maintain riparian rights and privileges to its citizens on their own side of the river."

This language, and particularly the latter portion of the quotation, is entirely consonant with the rights claimed here, for it distinctly recognizes the validity of the claim of each Commonwealth on behalf of its landowners to maintain riparian rights on their own side of the river. And there is nothing in the later case of Marine Ry. v. U. S., supra, which challenges this conclusion so far as it relates to these private rights. But in the still later case of Smoot v. Airport, 283 U. S. 348, which involved alone the question of jurisdiction, the decision in the West Virginia-Maryland case is criticized. But in this criticism, and in reaching the conclusion reached in the Smoot case, the Supreme Court was dealing solely with the question of the boundary between the States and not with the question of private rights, so that whatever disagreement there was to the conclusion reached in the West Virginia-Maryland case should be and must be confined to the effect of the former decision on the boundary, and that this is true is made apparent by the further language of the court in the Smoot case as follows:

"The compact is seen in a different light in Marine Railway & Coal Co. v. United States. As stated in 257 U. S. 64, article 7 gave the citizens of each State full property in

the shores of the river adjoining their lands and the privilege of carrying out wharves, etc., but left the question of boundary open to long-continued disputes. The rights of private citizens established by article 7 were further cared for by article 12 giving citizens of each State having lands in the other, liberty to transport to their own State the produce of such lands or to remove their effects, free of any charge or tax. But private ownership does not affect State boundaries."

This distinction—that is to say, the difference between the interstate boundary on the one hand and the private rights of property on the respective river banks on the other—is recognized in Oklahoma v. Texas, 260 U. S. 606, 632, where, discussing the treaty of 1819 between the United States and Spain, in relation to the use of the waters and the navigation of the Red and Arkansas Rivers, in which the treaty provision showed the boundary as "on the bank," it is said: "This part of the treaty provision is quite unlike the old compact considered in Maryland v. West Virginia, 217 U. S. 577, which gave to the citizens of Virginia full property in the shore of the Potomac, and so carried the jurisdiction and title to the water's edge," i. e., to low-water mark.

From a careful reading of these cases, it is clear to me that no more was decided in the Marine Railway and Smoot cases, supra, than that the territorial limits of the District of Columbia embrace the bed of the Potomac River to the Virginia bank, but at the same time, with due regard to the necessary implications from the quoted language of the opinions in those cases and Oklahoma v. Texas, it inevitably follows that the effect of the compact, as between the two Commonwealths, was the indefeasible grant of riparian rights by the State of Maryland to the citizens of Virginia owning land binding on the Potomac River, and that this right included the right to wharf out in front of their respective properties so as not to obstruct navigation. This has never been questioned or denied as between Maryland and Virginia, and it was held by the Supreme Court in Maryland v. West Virginia, supra, to apply as between those States. Why a different rule should apply to the District of Columbia is not apparent. When Virginia ceded to the nation the 10-mile strip for the District, it reserved the

rights of its citizens to their private property. Among those rights are the rights which the owners of land along the river front embraced within the District then had under the compact, and the rights thus secured are property rights appurtenant to the upland. The United States, by virtue of the cession, acquired no private rights of property. It therefore took the cession subject to those rights.

This conclusion is based on sound reasoning and finds its support in unquestioned acquiescence from the beginning by the two Commonwealths originally involved, and by acquiescence likewise on the part of the United States, for ever since the recession the upland proprietors on the Virginia side, particularly around Alexandria, have exercised, without question or interference on the part of the United States, their rights under the compact as riparian owners to build and maintain wharves and docks in front of their private property. The Potomac River from its mouth to the District of Columbia divides Maryland and Virginia. The distance is more than a hundred miles. From 1632, the date of the charter granted by Charles I to Lord Baltimore, to the time of the arbitration in 1877, there was doubt and some contention as to the precise boundary between the two States, Maryland claiming to the Virginia bank, and Virginia to the Maryland bank, but there was never any dispute during this entire period as to the right of the Maryland upland proprietor to the use of the river in the extension from his upland to the line of navigability in the erection of wharves, and equally no question or contention of the right of the Virginia upland proprietor to do likewise. These rights were recognized by the compact. If they had been so minded at the time, it is apparent the two Commonwealths might also have agreed that the middle line of the river should be established as the dividing line between them, but they did not do this and left that question open, and it was because of this that the Supreme Court felt called upon to say in the several cases referred to above that the true dividing line was that made by the charter to Lord Baltimore, unaffected by the subsequent grant to Lord Culpeper, and that no change having been made by agreement between the States affecting this line prior to the cession to the United States, no arbitration between the States after that event would affect it.

But this is not also true of the rights of property in the shores, for at the time of the cession by Virginia and by Maryland of the territory embraced within the District of Columbia the compact of 1785 by its terms had established such private rights, and these rights, whether they be regarded as a seizin of the land covered with water or a right of occupation only, sometimes termed a franchise, the two States solemnly pledged their faith should never be repealed or altered without the consent of the other. Potomac S. B. Co. v. Upper Pot. S. B. Co., 109 U. S. 672, 685. And even if it be conceded that during the period the property was within the District the United States might, as successor to the rights and powers of both States, have legislated with relation to these rights, it is not contended or suggested they ever did or that any of the privileges then appertaining to such private property were ever destroyed, and when the United States receded the territory to Virginia, it went back to Virginia, as was said by the Supreme Court in the Marine Railway case, supra, "*not changed by the grant of Virginia and the regrant by the United States.*" (Italics added.)

In this view, it is perfectly clear that under article 7 of the 1785 compact the landowner of the water front of the Potomac River on the Virginia side was granted all the rights which Maryland could grant to enable him to avail of the privileges of a riparian proprietor—a right recognized as property by both Maryland and Virginia. This right was never withdrawn by act of Congress. It therefore remains undiminished and enforceable to-day equally as though the cession from Virginia had never been made, and what this court said in Evans v. United States, 31 App. D. C. 544, to the effect that the compact, upon the cession, fell of its own weight and upon the recession was not revived, was unnecessary to the decision there, and when attempted to be applied, as it is in the opinion here, to private rights secured under the compact, is wholly wrong and without effect.

In this view we have next to consider whether the Secretary of War acted within his lawful discretion in refusing a permit for the erection of a wharf in front of appellants' property. The application for the permit was made pursuant to section 10 of the act of March 3, 1899. The act is

intended to provide the assent of the Government, under certain conditions, to the building of structures in the public waters, so as to preserve the public right of navigation. The granting of the permit is a finding that the structure to be erected will not interfere with commerce and navigation. The act has no relation in itself to the District of Columbia, except as it applies throughout the entire country. The permit, of course, grants no property right, and ought not to be and is not granted except in a case where the applicant shows title to the upland bordering on a navigable river. But in such a case, it has always heretofore issued as of right if it be found that the proposed structure would not impose a burden on navigation. The power to forbid is derived from the commerce clause of the Constitution, and that clause gives Congress control of the navigable rivers in the interest of commerce and navigation. When that condition is satisfied the power falls.

In this case the title of appellants to land in Virginia bordering the river and opposite the District is undisputed. It is quite true that appellants' land has been extended out beyond its original boundaries, but this change has been from natural and gradual processes, which added imperceptibly to appellants' property on the Virginia bank. This gradual change is known as accretion, and the additional land has thus become an essential attribute of the original property. That this accretion belongs to the owner of the land has always been recognized in the United States. See Arkansas v. Tenn., 246 U. S. 158; and Shively v. Bowlby, supra, p. 35. And in Oklahoma v. Texas, 265 U. S. 499, the court said:

"The boundary between the two States is not an unswerving line, but a river bank; and where through the natural or gradual processes of erosion or accretion the bank is changed the boundary follows the change."

The case, therefore, is one in which an upland proprietor on the Virginia bank bordering the Potomac River, whose right to wharf out in front of his property is granted by the compact between Maryland and Virginia, unaffected by any legislation on the part of Congress after the cession by Virginia and Maryland to the United States, and whose proposed wharf has been found by the Secretary of War

not to be an obstruction to navigation, is nevertheless denied the permit authorized under section 10 of the rivers and harbors act of 1899; and it is insisted on behalf of the Secretary that because of an act of Congress for the development and completion of the George Washington Memorial Parkway and because in the carrying out of that project it is intended to construct a parkway along the shore of the river on the Virginia side and in front of appellants' property, he is entitled thus to exercise a discretion, having no relation to commerce and navigation, in the granting and withholding of the permit. But the permit applied for, as we have already seen, has relation alone, under the statute, to the question whether the proposed structure will interfere with the navigable capacity of the river. This question being decided in favor of the applicant, and his ownership of the adjacent upland being conceded, it must follow that the refusal of the Secretary can not be sustained on the ground on which it is sought to place it. He says in his letter denying the permit:

"After having gone into the matter fully with yourself and your representative and with Colonel Ulysses Grant, III, the chairman of the National Capital Park and Planning Commission. I have concluded that the development contemplated by you interferes with a public policy."

The public policy to which the Secretary refers is the policy announced by Congress in the act relating to the George Washington Highway. But this has no relation to his duty under the rivers and harbors act. The discretion there conferred on him is to ascertain whether the granting of a permit will obstruct navigation. When it is shown that it will not, the discretion which the act confers is exhausted, and he may not have resort to another ground as the basis of a refusal to issue the permit. Kansas v. Colorado, 206 U. S. 46; New York v. Dept. of Health, 226 N. Y. 209.

While the act of Congress to which we have referred contemplates the building, under the direction of a planning commission, of a memorial parkway which shall extend from Mount Vernon to the Great Falls on the Virginia side of the river, we must also take notice of the fact that the act provides that the project shall depend upon the appropriation of certain money and the dedication of certain lands or money by the States of Maryland and Virginia,

or the political subdivisions thereof, or by private interests, and we are not informed that such action has been taken by either Commonwealth, or by any subdivision thereof, or that private persons have advanced the funds or dedicated the lands necessary to the project. In the meantime, the owner of a water lot bordering the river, entitled to enjoy the advantages thus conferred upon his land by its adjacency to the river, which includes the right to access to the navigable part thereof, and which right, whether it be a property right or an easement, can not be questioned, and whose proposed structure it has been determined will not interfere with the navigation of the river, applies for, and I think is entitled to receive, a permit for the construction of his wharf. In such circumstances, we can not say that, because at some future time the land or the waters in front of it may be needed for a work of public improvement, his own rights are lost or must be held in abeyance. To hold otherwise is to condone the spoliation of private right by public authority and to approve the exercise of an arbitrary discretion which, if conceded may now and in the future both oppressive and dangerous. Appellants' property is useful only for wharf purposes, but that use gives it value. Without the permit the value is lost, and unless redress can be afforded here, it can be found nowhere else. The case is peculiarly one in which the writ should issue.

Nothing I have said may be construed as suggesting the United States have not the right to take the property. If Congress has authorized its taking for parkway purposes, as to which the record is silent, it may be taken by condemnation in a proper proceeding for that purpose. The United States may perhaps have other rights with which we are not now concerned. But to say that, because at some future time the land or the water in front of it may be needed for a work of public improvement, appellants' property rights are lost or must be held in abeyance, is wholly without merit.

The decision of the lower court should be reversed and the writ awarded.

I am authorized by Judge Hitz to say he concurs in this dissent.

A true copy. Teste:

—— ——, Clerk Court of Appeals, D. C.

Monday, January 16th, A. D. 1933.

* * * * * * *

No. 5692, January Term, 1933

THE UNITED STATES OF AMERICA on Relation of LUCIEN H. GREATHOUSE and REBEKAH S. GREATHOUSE, Appellants,

vs.

PATRICK J. HURLEY, as Secretary of War, and LYTLE BROWN, as Chief of Engineers

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel,

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed.

Per Mr. Justice Van Orsdel, January 16, 1933.

Dissenting: Mr. Justice Groner, Mr. Justice Hitz concurring in the dissent.

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No. 5692

THE UNITED STATES OF AMERICA ex Rel. GREATHOUSE et al., Appellants,

vs.

PATRICK J. HURLEY, as Secretary of War et al.

DESIGNATION OF RECORD

The clerk will please prepare a transcript of the record in the above entitled cause, including therein the following:

1. The printed record.

2. Minute entry as to argument.

3. Order directing rehearing.

4. Minute entry as to reargument.

5. Opinion and dissenting opinion.

6. Copy of judgment.

7. This designation.

8. Clerk's certificate.

Spencer Gordon, Attorney for Appellants.

Endorsed: 5692. The United States of America ex rel. Greathouse, et al., Appellants, vs. Patrick J. Hurley as Secretary of War, et al. Designation of Record. Court of Appeals. District of Columbia. Filed January 21, 1933. Henry W. Hodges, Clerk.

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COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 81, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals as designated by counsel in the case of The United States of America on Relation of Lucien H. Greathouse and Rebekah S. Greathouse, Appellants, vs. Patrick J. Hurley, as Secretary of War, and Lytle Brown, as Chief of Engineers, No. 5692, January Term, 1933, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 23rd day of January, A. D. 1933.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal Court of Appeals, District of Columbia.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 13, 1933

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
FEB 9 1
CHARLES ELMORE

# In the Supreme Court of the United States

OCTOBER TERM, 1932.

No. 677

THE UNITED STATES OF AMERICA, ON RELATION OF LUCIEN H. GREATHOUSE AND REBEKAH S. GREATHOUSE, *Petitioners,*

*v.*

PATRICK J. HURLEY, AS SECRETARY OF WAR, AND LYTLE BROWN, AS CHIEF OF ENGINEERS.

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

J. HARRY COVINGTON,
JOHN MARSHALL,
SPENCER GORDON,
*Attorneys for Petitioners.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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# In the
# Supreme Court of the United States

OCTOBER TERM, 1932.

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No.

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THE UNITED STATES OF AMERICA, ON RELATION OF LUCIEN H. GREATHOUSE AND REBEKAH S. GREATHOUSE, *Petitioners*,

*v.*

PATRICK J. HURLEY, AS SECRETARY OF WAR, AND LYTLE BROWN, AS CHIEF OF ENGINEERS.

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States.*

The United States of America, on the relation of Lucien H. Greathouse and Rebekah S. Greathouse, petitioners, respectfully represent:

## The Decision Below.

January 16, 1933, the Court of Appeals of the District of Columbia affirmed a judgment of the Supreme Court of the District of Columbia dismissing a petition for mandamus filed by these petitioners (R. 83). The decision, after reargument (R. 62), was by a divided Court, Mr. Justice Groner and Mr. Justice Hitz dissenting (R. 73, 82).

The opinion has not yet been reported. It appears in the record at page 63. The dissenting opinion appears at page 73.

## Jurisdiction.

The judgment of the Court Appeals of the District of Columbia was entered January 16, 1933 (R. 83). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936.

## Statement.

This is an application for the writ of mandamus to compel the Secretary of War to issue a permit for the construction of a wharf in the Potomac River from and in front of land owned by the relators on the Virginia shore opposite the District of Columbia. It has been stipulated that the proposed wharf will not obstruct navigation (R. 38). The application for the wharf permit was made pursuant to a statute of the United States which was part of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1151 and which is also contained in 33 U. S. C., Section 403, entitled "Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in," as follows:

> *"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of*

*any of the waters of the United States is hereby prohibited;* and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same." (Italics ours.)

Charles H. Greathouse, then the owner of the land in question, had contracted to sell it to the Sun Oil Company, provided a wharf permit could be obtained (R. 40). The application for the permit was made in the name of the Sun Oil Company pursuant to a provision of the contract that Greathouse would apply "in his name or in the name of Sun" (R. 41). While the application was pending Charles H. Greathouse conveyed the land to his son and daughter-in-law, who are the relators (R. 39, 42, 43), and they have extended the agreement with the Sun Oil Company by successive contracts, so that they will sell the land to Sun if the permit is granted, but not otherwise (R. 41, 42, 44).

The Chief of Engineers conducted a hearing on the application, found that the proposed structure would not obstruct navigation, and recommended that the permit for the wharf be granted on the plans submitted (R. 12, 45). The Secretary of War, however, refused to issue the permit (R. 15). At the opening of the case in the trial court it was stipulated,

> "that the construction of the wharf, fender piles, etc., as applied for * * * will not obstruct navigation, and * * * the decision of the Secretary of War declining to authorize such construction was not by reason of any matter connected with navigation, but that *the only thing that the Secretary had in mind was that the project was against public policy and particularly opposed to the program contemplated by the Crampton Act and the proposed George Washington Memorial Parkway.*" (R. 38, italics ours.)

This program contemplated, at some time in the uncertain future, the acquisition for park purposes of lands along the Virginia shore of the Potomac River. (See Crampton Act, 46 Stat. 482.) While the application for the wharf permit was under consideration, the Director of the National Park and Planning Commission urged the Secretary of War to refuse to issue it, pointing out that if the wharf permit were granted the Sun Oil Company would take the property and would build tanks thereon, and that this would increase the amount that the Government would have to pay for the property when it was condemned, whereas if the wharf permit were refused, the Sun Oil Company would not take the property and would not build tanks, the result of which would be that when the Government ultimately acquired the property by condemnation it would not have to pay so much for it (R. 53, 54).

Upon refusal of the Secretary to issue the permit this action of mandamus was instituted. The suit was dismissed in the Supreme Court of the District of Columbia (R. 35), and this dismissal was affirmed by the Court of Appeals (R. 83). The grounds of this decision as stated in the majority opinion were:

1. The owner of lands in Virginia opposite the District of Columbia has no right to build a wharf into the Potomac River even though such wharf will not obstruct navigation.

2. In determining whether or not to issue a wharf per-

mit the Secretary of War has "unlimited discretionary jurisdiction," and may take into consideration matters not connected with navigation.

3. Relators' rights are "conditional, contingent, prospective and inchoate," for the enforcement of which mandamus will not lie.

The dissenting opinion took the following view which we shall urge is the correct one:

1. The owner of lands in Virginia opposite the District of Columbia has the right to build a wharf into the Potomac, subject only to the condition that the same is not detrimental to the public interest in the navigation of the river. This is a property right expressly recognized by the Compact of 1785 between Maryland and Virginia which provided:

> "Seventh, The citizens of each state respectively shall have full property in the shores of Patowmack River adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river, * * *" *Maryland Laws*, Kilty Vol. 2, Nov. 1785, Chap. 1.

2. The only discretion conferred upon the Secretary of War by the Rivers and Harbors Act is in determining whether the proposed construction will obstruct navigation. When the Secretary finds that the wharf will not obstruct navigation, the discretion which the act confers is exhausted and the Secretary may not resort to another ground as the basis of a refusal to issue the permit.

3. "Appellants' property is useful only for wharf purposes, but that use gives it value. Without the permit the value is lost, and unless redress can be afforded here, it can be found no where else. The case is peculiarly one in which the writ should issue" (R. 82).

**Reasons Relied on For Allowance of Writ.**

1. Whether the Secretary of War, acting pursuant to the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1151, may refuse to issue a wharf permit, for reasons wholly unrelated to navigation, is a Federal question of general importance, the determination of which is of interest to every community dependent upon navigable waters for part of its trade. Individuals and communities are being urged at this time to revive business and create employment by construction projects including wharves, bridges, and other structures upon navigable waters. Whether any such project may be stopped by the refusal of the Secretary of War to issue a permit, although admittedly no obstruction to navigation is involved, is a question which this Court should decide.

2. In view of the Federal park projects and other developments now under way along the Potomac River involving the acquisition of land on the Virginia shore opposite the District of Columbia, it is of importance to the United States to determine whether the owners of such land have the right to build wharves, since the determination of this question necessarily affects the value of the land. This involves the Compact of 1785 between Virginia and Maryland, and successive legislation by Virginia, Maryland and the United States, including the Organic Act of the District of Columbia of 1801, 2 Stat. 103, and the Act of Recession to Virginia of 1846, 9 Stat. 35.

**Conclusion.**

Wherefore, the petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the District of Columbia.

Respectfully submitted,

J. Harry Covington,
John Marshall,
Spencer Gordon,
*Attorneys for Petitioners.*

## BRIEF IN SUPPORT OF PETITION.

### Opinion Below.

The opinion of the Court of Appeals of the District of Columbia (R. 63) has not yet been reported.

### Jurisdiction.

The judgment of the Court of Appeals of the District of Columbia was entered January 16, 1933 (R. 83). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936.

### Questions Presented and Statement.

The questions presented and a statement of the case will be found in the petition.

### Specification of Errors to be Urged.

The Court of Appeals of the District of Columbia erred:

1. In failing to hold that an owner of lands bordering the Potomac in Virginia opposite the District of Columbia has the right to build a wharf if it does not obstruct or injure the navigation of the river.

2. In holding that the Secretary of War may refuse to issue a permit for a wharf by reason of matters other than those relating to navigation.

3. In holding that mandamus will not lie for the enforcement of the relators' rights.

## Argument.

### The Owner of Land Bordering the Potomac River in Virginia Opposite the District of Columbia has the Right to Build a Wharf if it Does not Obstruct or Injure the Navigation of the River.

This precise point has never come before this Court for decision. It has been established that the jurisdiction of the District of Columbia goes to the high-water mark of the Potomac River on the Virginia shore. *Marine Railway Company v. United States*, 257 U. S. 47; *Smoot Sand & Gravel Corporation v. Washington Airport*, 283 U. S. 348. But these cases are in no way inconsistent with the contention that Virginia landowners have the right to build wharves which do not obstruct navigation, and they contain language which indicates an agreement with this view, for example:

> "As stated in 257 U. S. 64, Article 7 (of the Compact of 1785) gave the citizens of each State full property in the shores of the River adjoining their lands and the privilege of carrying out wharves * * *."—*Smoot Sand & Gravel Corporation v. Washington Airport, Inc.*, 283 U. S. 348, 351.

It was assumed by the trial court (R. 23) and by the Court of Appeals (R. 67) that, because by the common law of England the construction of a wharf in navigable water was an invasion of the King's *jus privatum* and a purpresture which might be abated, the same rule applied in the Potomac, so that a wharf from the Virginia shore might be abated at any time by the sovereignty which owned the bed of the stream. This assumption overlooked the fact that conditions were so different in Colonial Maryland and Virginia that it is reasonable to hold that this principle of common law never obtained in those Colonies.

Thus in *Shively v. Bowlby*, 152 U. S. 1, in referring to the right to build a wharf, this Court said:

> "The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as has been modified by the charters, constitutions, statutes *or usages* of the several Colonies and States, or by the Constitution and laws of the United States." (p. 14, italics ours.)
>
> "The governments of the several Colonies, with a view to induce persons to erect wharves for the benefit of navigation and commerce, early allowed to the owners of lands bounding on tide waters greater rights and privileges in the shore below high water mark, than they had in England." (p. 18.)

The navigable streams of Maryland and Virginia were great tidal rivers, in magnitude far beyond anything known in England, and the life of those Colonies was centered in plantations bordering these rivers, each plantation with its own wharf from which tobacco and other products were shipped to England. See *Potomac Landings* by Paul Wilstach, Chap. 1. The wharf was a necessity of plantation life, and by usage in these Colonies the landowners bordering these tidal streams were permitted to build and maintain their wharves, so long as they did not interfere with navigation.

We have found no Maryland case expressly holding that there was such a right to build a wharf prior to the Compact of 1785 hereafter referred to, but this difference between the common law of England and America is well recognized. For example, in an exhaustive note in 40 L. R. A. 635, it is stated that in England there were several adverse rights to be considered in determining whether or not a riparian owner had a right to construct a wharf, first, the navigator's right to land his goods; second, the King's *jus privatum* in the soil covered by water; and, third, the *jus publicum* which was the right to have the water kept free from obstructions for the purpose of navigation. The note then continues:

> "In this country there was only the right of the riparian owner and the *jus publicum* to be considered. In the early days the navigable channels were in most cases ample, the need of wharves urgent, and the public funds deficient. So, by common consent, supplemented in some instances by legislation, the riparian owner was permitted to erect wharves, and his right to do so was unquestioned."

But whatever may have been the effect of the usage of Maryland and Virginia in Colonial days as to wharves, the right to build a wharf into the Potomac from the Virginia shore was expressly recognized and legalized as a property right by the Compact of 1785 between Virginia and Maryland, and has been maintained unimpaired by subsequent legislation down to the present time.

By the Compact of 1785 entered into between commissioners appointed by Maryland and Virginia, it was provided:

> "Seventh, The citizens of each state respectively shall have full property in the shores of Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river * * *." *Maryland Laws*, Kilty, Vol. 2, Nov. 1785, Chap. 1.

This Compact was ratified by the Legislature of Maryland, March 12, 1786, by an act which recited the Compact and thereafter provided:

> "Be it enacted, by the General Assembly of Maryland, That the said compact is hereby approved, confirmed and ratified, and that as soon as the said compact shall be approved, confirmed and ratified, by the general assembly of the Commonwealth of Virginia, thereupon, and immediately thereafter, every article, clause, matter and thing, in the same compact contained, shall be

obligatory on this State and the citizens thereof, and shall be forever faithfully and inviolably observed and kept by this government, and all its citizens, according to the true intent and meaning of the said compact; and the faith and honour of this State is hereby solemnly pledged and engaged to the general assembly of the Commonwealth of Virginia, and the government and citizens thereof, that this law shall never be repealed or altered by the legislature of this government, without the consent of the government of Virginia." *Maryland Laws*, Kilty, Vol. 2, Nov., 1785, Chap. 1.

The Compact was also ratified by the legislature of Virginia, on March 28, 1785, 12 Hening, Va. Stat., p. 50.

In 1789 and 1791, respectively, Virginia and Maryland ceded to the United States the territory which became the District of Columbia. In the Maryland act of cession there was a proviso as follows:

"* * * nothing herein contained shall be so construed to vest in the United States any right of property in the soil, as to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States, * * *" *Maryland Laws*, Kilty, Vol. 2, November, 1791, Chap. 45, Sec. 2.

The Virginia act of cession contained a proviso in practically the same language, 13 Hening, Va. Stat., p. 44, Sec. 2.

The Organic Act of the District of Columbia of 1801, 2 Stat. 103, D. C. Code, p. 449, provided:

"That the laws of the State of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia, which was ceded by the said State to the United States, and by them accepted for the permanent seat of government; and that the laws of the State of Maryland, as they now exist, shall be and continue in force in that part of the said district, which

was ceded by that State to the United States, and by them accepted as aforesaid."

In 1846 there was a recession to Virginia of the territory ceded by her to the United States, and this Act provided:

> " * * * all the rights and jurisdiction therewith ceded over the same, be, and the same are hereby, ceded and forever relinquished to the State of Virginia, in full and absolute right and jurisdiction, as well of soil as of persons residing or to reside thereon." 9 Stat. 35, 36.

Whatever may have been the right of a landowner on the Virginia shore of the Potomac to build a wharf therefrom according to the usage of Maryland and Virginia prior to 1785, we maintain that after the Compact of 1785 such landowners had "full property in the shores of the Patowmack river adjoining their lands, and the privilege of making and carrying out wharves and other improvements so as not to obstruct or injure the navigation of the river," that this became the law of Virginia by the Virginia Statute of 1789 and the law of Maryland by the Maryland Statute of 1791, that it became the law of the District of Columbia by the Organic Act of 1801, adopting the laws of Virginia and Maryland, that while the property was within the District of Columbia no legislation purported to affect this right to build wharves from the Virginia shore, and that the Act of 1846 receding the territory to Virginia ended all possibility of Congress affecting the right to build such wharves.

> "The original state of things was not changed by the grant of Virginia and the regrant by the United States of the part of the District on the Virginia side." *Marine Railway Co. v. United States*, 257 U. S. 47, 63.

Virginia landowners on the Potomac opposite the District of Columbia thus have "full property in the shores

* * * and the privilege of making and carrying out wharves * * * so as not to obstruct or injure the navigation of the river."

For a thorough analysis of the decisions dealing with the river, including *Maryland v. West Virginia*, 217 U. S. 577; *Marine Railway Company v. United States*, 257 U. S. 47; *Smoot Sand & Gravel Corporation v. Washington Airport, Inc.*, 283 U. S. 348; and *Evans v. United States*, 31 App. D. C. 544, reference is made to the opinion of Mr. Justice Groner (R. 73-80).

**The Secretary of War may not Refuse to Issue a Permit for a Wharf by Reason of Matters not Relating to Navigation.**

The statute under which the Secretary of War acted is part of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1151 and is also contained in 33 U. S. C., Sec. 403, where it is entitled "Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in," as follows:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work

> has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

The substantive law of this act is contained in the first clause:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited."

The rest of the section is directory, entrusting its administration to the Chief of Engineers and the Secretary of War.

We recognize, of course, that there is a discretion confided to the Chief of Engineers and to the Secretary of War by this statute. If they find that a proposed construction will obstruct navigation, that is the end of the matter unless it can be shown that the decision has no reasonable basis and is clearly arbitrary. But the discretion confided to these officials by the act is clearly a discretion only in regard to determining whether or not the proposed construction will in fact obstruct navigation. This is clear from:

> (a) The language of the act. It prohibits only the creation of obstructions to the navigable capacity of any of the waters of the United States.
>
> (b) The constitutional basis of the act. The act is not local to the District of Columbia, but is applicable throughout the United States wherever there are navigable waters. Congress derives its power to enact such legislation only from the commerce clause of the Constitution. *Gibbons v. Ogden*, 9 Wheat. 1; *Kansas v. Colorado*, 206 U. S. 46. Congress has power to prohibit wharves in navigable streams throughout

> the United States only to the extent that such wharves obstruct navigation, and Congress can give the Secretary of War no greater power.

Here the Chief of Engineers not only found that the proposed structure would not obstruct navigation, and recommended that the permit be granted (R. 12, 46), but he reported to the Secretary that

> "* * * there has not been a single objection to the construction of the wharf from the standpoint of navigation." (R. 46.)

In the majority opinion below appears the following statement:

> "The Secretary may well have concluded that the structure of the wharf in question, a short distance above a bridge costing millions of dollars, would so alter or modify the course of the stream as to result in damage to the bridge." (R. 70.)

This statement does not purport to be based on anything in the record, and it is directly contrary to the stipulation made at the opening of the case as follows:

> "At the opening of the case the following agreement was made by counsel: Counsel for the defendants admits that the construction of the wharf, fender piles, etc., as applied for which is involved in this case will not obstruct navigation, and says that the decision of the Secretary of War declining to authorize such construction was not by reason of any matter connected with navigation, but that *the only thing* that the Secretary had in mind was that the project was against public policy and particularly opposed to the program contemplated by the Crampton Act and the proposed George Washington Memorial Parkway." (R. 38, italics ours.)

The Crampton Act referred to is the Act of May 29, 1930, 46 Stat. 482. It provides for the creation of the George Washington Memorial Parkway to include the shores of the Potomac and adjacent lands from Mount Vernon to a point above the Great Falls on the Virginia side. It is fair to say that this parkway *may* include part of the relators' land, but it is not correct to assume as did the court below that the relators' land will undoubtedly be taken, for the Crampton Act expressly provides:

> "As to any lands in Maryland or Virginia along or adjacent to the shores of the Potomac within the proposed limits of the parkway that would involve great expense for their acquisition and are held by said Commission not to be essential to the proper carrying out of the project, the acquisition of said land would not be required upon a finding of the Commission to that effect."

In any event this development and the acquisition of any part of the relators' land by the United States is entirely in the future and perhaps in the distant future. There is no justification for a statement made at the conclusion of the majority opinion below that "ample funds" have been "appropriated under the parking act to acquire the lands adjacent to the river for parking purposes" (R. 72). On the contrary, although certain funds have been "authorized to be appropriated" by the Crampton Act, 46 Stat. 482, no funds have as yet been appropriated to our knowledge, and the Crampton Act expressly provides:

> "Such funds shall be appropriated as required * * * *Provided*, That no money shall be expended by the United States for lands for any unit of this project until the National Capital Park and Planning Commission shall have received definite commitments from the State of Maryland or Virginia or political subdivisions thereof or from other responsible sources for one-half the cost of acquiring the lands in its judgment

necessary for such unit of said project deemed by said Commission sufficiently complete, other than lands now belonging to the United States or donated to the United States." 46 Stat. 482, 483.

There is no evidence that any such "definite commitments" have been received from the State of Virginia. As far as we know, no such commitments are in prospect, and in the present depression it is fanciful to believe that any such commitments will be received in the near future. Meanwhile, the decision of the majority below is that the owners of the land are to be prevented from developing its natural use as a water front.

The Director of the National Park and Planning Commission testified that while the Secretary of War had the application for the wharf permit under consideration, the Director urged the Secretary to refuse the wharf permit because if the wharf permit were granted the Sun Oil Company would take the property and would build tanks thereon, which would increase the amount that the Government would have to pay for the property when condemned, but if the wharf permit were not given the Sun Oil Company would not take the property and would not build tanks, the result of which would be that when the Government acquired the property by condemnation it would not have to pay so much for it (R. 53, 54). Of course, the Government may take the property at any time by condemnation, but we respectfully submit that it is an act of tyranny to prevent the natural development of the property for an indefinite period until the Government determines that it is ready to take it.

In a very similar case, Attorney General Wickersham gave as his opinion that in determining whether permission should be given for the erection of a dolphin off the coast of Santa Barbara, California, for the purpose of unloading oil from steamers, the Chief of Engineers and the Secretary of War should not consider the injury to an

adjacent bathing beach by reason of oil which would be spilled from the dolphin, or any other similar reason not having direct relation to the navigable capacity of the waters and their use for interstate or foreign commerce. The Attorney General advised the Secretary of War that such consideration should not prevent the approval of the plan, provided it would otherwise have the approval of the Chief of Engineers and the Secretary. Only considerations of space prevent us from quoting in full from this opinion, which demonstrates that

> " * * * the statute in question restricts the authority of the Secretary of War to very narrow limits." 27 Opinions Atty. Gen. 284, 287.

There are many decisions to the effect that an administrative officer or board to whom application is to be made for a permit may not refuse to grant it because of matters disconnected with the questions that the officer or board should properly decide in his or its discretion as a basis for granting or refusing the permit. In such cases mandamus will lie. For example, in *New York v. Department of Health*, 226 N. Y. 209, the Board of Health had refused to issue a license for a hospital for the reason that—

> "considerable damage would accrue to the surrounding property if the permit were issued."

It was held that this reason did not come legally within the scope of the discretion of the Board and the writ of mandamus issued. To the same effect are *Jackman v. Public Service Commission*, 121 Kan. 141; *People v. Robinson*, 126 N. Y. S. 546, 141 App. Div. 656; *Empire Home Furnishers v. White*, 256 N. Y. S. 451, 145 Misc. Rep. 285; *Nicodemus v. State*, 82 Okla. 152; *Coyne v. Prichard*, 272 Pa. 424; *Wright v. France*, 279 Pa. St. 22; *State v. Mayor*, 94 W. Va. 189.

The discretion conferred upon the Secretary of War by the statute was to ascertain whether the granting of a permit would obstruct navigation. He exercised this discretion and found that navigation would not be obstructed. There remained then only the ministerial duty to grant the permit. To compel the performance of this duty the writ of mandamus will issue. *Marbury v. Madison,* 1 Cranch 137.

**The Relators as the Owners of Land in Virginia Bordering on the Potomac River May Maintain This Action.**

While the concluding paragraphs of the majority opinion below contain language which may leave the reader in doubt as to whether the relators are the owners of land bordering on the river, there is in fact no question on that point.

At the conclusion of the majority opinion the statement is made:

> "It was conceded in the argument in this court that notices had been posted upon the lands, and that action has been taken in the Supreme Court of the District of Columbia to determine the title to these lands." (R. 72)

It is true that long after the petition for mandamus was filed and shortly before the trial the Park and Planning Commission posted some notices on the land (R. 56), a proceeding which could not affect the title under any known principle of law and which the trial justice jocosely called "homesteading." (R. 56.) The record, however, does *not* show that any action has been taken in the Supreme Court of the District of Columbia to determine the title to these lands, the court below is mistaken in understanding that any such concession was made in the argument, and no such suit has in fact been filed.

The trial court expressly found in the opening paragraph of its opinion that the wharf was to be—

> "in the Potomac River on the Virginia shore adjacent to the land owned by the relators." (R. 19.)

The relators showed (R. 39, 40, 48) and the trial court so found (R. 19) that their predecessors in title had owned land bordering on the Potomac River, that there had been a gradual and imperceptible increase to the land either by alluvium or by a gradual, imperceptible receding or dereliction of the water.

> "The rule, everywhere admitted, that where the land encroaches upon the water by gradual and imperceptible degrees, the accretion or alluvion belongs to the owner of the land, is equally applicable to lands bounding on tide waters or on fresh waters, and to the King or the State as to private persons; and is independent of the law governing the title in the soil covered by the water." *Shively v. Bowlby*, 152 U. S. 1, 35.

The majority opinion below says that this suit is part of "a land speculation" and that the matters involved are "conditional, contingent, prospective and inchoate," for which reason the Court below holds that the writ may not issue.

There is no land speculation involved and the interest of the relators is a very real one. The present relators are the son and daughter-in-law (R. 42, 43) of Charles H. Greathouse, the former owner of the land, who had contracted to sell it to Sun Oil Company if a wharf permit could be obtained (R. 41). This contract provided that the application might be made by Greathouse "at his own option, either in his name or in the name of Sun" (R. 41). The application was made in the name of the Sun Oil Company (R. 47). That was the simple, natural way to make the

application, inasmuch as the Sun Oil Company was going to use the wharf and the Sun Oil Company's engineers would naturally prepare the plans. On the contrary, it would have been somewhat underhanded for Greathouse to have made the application in his own name when he had theretofore contracted to sell the land to Sun if the permit were granted. The statement in the application that Sun owned the land was correct to the extent that Sun had contracted to buy the land if the permit were granted. The title and interest of the Sun Oil Company is inextricably involved with the title and interest of the relators. They both have title to the land, the Greathouses still holding legal title and the Sun Oil Company having an equitable title under its contract of purchase, *Pomeroy's Equity Jurisprudence*, 4th Ed., Vol. 1, Secs. 105, 368, *Story's Equity Jurisprudence*, 14th Ed., Vol. 3, Sec. 1612, subject only to the issue of the wharf permit to which it was entitled. The Chief of Engineers expressly found:

> "The Sun Oil Company has secured all the authority that is necessary to build its establishment on the shore in Virginia." (R. 46.)

The question of who owned the land or in whose name the application was made had nothing to do with the Secretary's denial of the application.*

The relators now own the land. If the permit is granted they can sell the land to the Sun Oil Company (R. 41). If it is not granted they cannot make the sale (R. 41). Under their contract with Sun Oil Company they must endeavor to secure the permit by such litigation as may be appropriate (R. 42). They are certainly interested in the land to which they hold legal title, in the contract of sale to

*The majority opinion seems to suggest that the permit was denied because "upon investigation" it appeared "that the Sun Oil Company was not the owner of the property" (R. 69). If this is what the Court meant, we respectfully submit that such a holding is not warranted by anything in the record, and is completely refuted by the stipulation frequently referred to in this brief which gave the Secretary's reasons for his decision (R. 38).

which they are now parties, and in the application which was made for their benefit and the granting of which is a condition precedent to the sale of the land. We respectfully submit that the view taken by Mr. Justice Groner is the correct one where he said,

> "Appellants' property is useful only for wharf purposes, but that use gives it value. Without the permit the value is lost, and unless redress can be afforded here, it can be found no where else. The case is peculiarly one in which the writ should issue." (R. 82.)

**Conclusion.**

It is therefore urged that the writ issue as prayed in the petition.

Respectfully submitted,

J. Harry Covington,
John Marshall,
Spencer Gordon,
*Attorneys for Petitioners.*

FILE COPY

APR 3

# Supreme Court of the United States

No. 677, October Term, 1932.

The United States of America, on Relation of Lucien H. Greathouse and Rebekah S. Greathouse, *Petitioners*,

v.

George H. Dern, as Secretary of War, and Lytle Brown, as Chief of Engineers.

Certiorari to the Court of Appeals of the District of Columbia.

## BRIEF FOR PETITIONER.

J. Harry Covington,
John Marshall,
Spencer Gordon,
*Attorneys for Petitioners.*

Press of Byron S. Adams, Washington, D. C.

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# Supreme Court of the United States

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Certiorari to the Court of Appeals of the District of Columbia.

## BRIEF FOR PETITIONER.

### Report of Opinion Below.

The opinion of the Court of Appeals (Rec. p. 63) is reported in 61 W. L. R. 106.

### Jurisdiction.

This case is on certiorari to the Court of Appeals of the District of Columbia under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat.

936. The judgment of the Court of Appeals was entered January 16, 1933 (R. 83). The petition for certiorari was filed in this Court February 9, 1933, and the writ was granted March 13, 1933.

## Statement of the Case.

This is an application for the writ of mandamus to compel the Secretary of War to issue a permit for the construction of a wharf in the Potomac River from and in front of land owned by the relators on the Virginia shore opposite the District of Columbia, a short distance above Key Bridge. *It has been stipulated that the proposed wharf will not obstruct navigation* (R. 38).

In 1929, Charles H. Greathouse was in possession of the land in question, and held title under a deed from Augustus S. Worthington, dated December 13, 1921 (R. 39). Worthington had acquired the property from Henry H. Wells by deed dated June 16, 1892 (R. 39). The early surveys showed the land as bounded on the north by the Potomac River with an old chestnut tree on the River bank, but as the years went on the soil was extended northward by gradual accretion (R. 48 and plats following R. 58). The descriptions in the deeds to Worthington and Greathouse began with the chestnut tree, but included "all accretions, land and other riparian rights pertaining to any of the land herein described and binding on the Potomac River" (R. 39, 40).

By contract dated June 24, 1929, Charles H. Greathouse agreed to sell this land to the Sun Oil Company (R. 41). The purchase price was to be $40,000, and the purchase was to be contingent upon—

> "the issuance by the authorities of the Federal Government of such permits as are legally necessary for the construction of requisite wharves, piers, pipe lines and moorings out from and in front of said property into and in the Potomac River for the loading and unloading of tank barges and like vessels."

Charles H. Greathouse agreed in this contract that, upon receipt of plans from Sun Oil Company, he would make application for the permit "at his own option, either in his name or in the name of Sun". By its terms the contract was to expire December 31, 1929.

In October, 1929, application was made as follows:

> "District Engineer's Office,
> United States Army,
> Washington, D. C.
> "Gentlemen:
>
> "We request a permit for the construction of a wharf and fender piles as shown on the attached plan, to be built in the Potomac River approximately 400 yards above the Key Bridge at Rosslyn, Virginia. We own the land in front of which the wharf will be built.
>
> "Very truly yours,
> "SUN OIL COMPANY,
> "By J. N. Pew, Jr.,
> Vice-President." (R. 46, 47).

May 9, 1930, the Chief of Engineers held a public hearing to consider this application (R. 45), and under date of August 7, 1930, Major General Lytle Brown, Chief of Engineers, reported to the Secretary of War:

> "3. * * * there has not been a single objection to the construction of the wharf from the standpoint of navigation * * *.
>
> "4. * * * The Sun Oil Company has secured all the authority that is necessary to build its establishment on the shore in Virginia.
>
> "5. This application has been before this Department since October, 1929, during which time it has been given very careful consideration. The data submitted by both proponents and opponents have been thoroughly studied and after mature deliberation I have come to the conclusion that my power under the existing law, Section 10 of the River and Harbor Act of March 3, 1899, precludes me from taking into consideration the objections raised by the opponents with a

view to withholding approval of the application solely upon the grounds of such objections. Further delay on my part would be an abuse of my authority and a deprivation of the rights of citizens under the law. The prevention of the proposed development in the interest of the beautification of the National Capital and its environs is a matter to be determined by other agencies.

"6. I therefore recommend that the construction of the wharf be authorized in accordance with the provisions of the aforementioned Section 10, subject to the conditions in draft of instrument which I have signed." (R. 45, 46, 47)

The Chief of Engineers prepared a permit for the construction of the wharf, signed it, and sent it with his report to Patrick J. Hurley, the Secretary of War. (R. 47).

August 15, 1930, this recommendation was "returned to the Chief of Engineers without approval of Sec. War" (R. 47). After further consideration, by letter of August 27, 1930, to Mr. J. Edgar Pew of the Sun Oil Company, the Secretary stated:

"The building program, the beautification of the Potomac River and its environs, and the acquisition of park land have in part already received the sanction of Congress. It is no longer merely an executive program. It is a policy of the Government. After having gone into the matter fully with yourself and your representative, and with Col. Ulysses Grant III, the Chairman of the National Park & Planning Commission, I have concluded that the development contemplated by you interferes with a public policy." (R. 18).

At the opening of the case in the trial court it was stipulated:

"that the construction of the wharf, fender piles, etc., as applied for * * * will not obstruct navigation, and * * * the decision of the Secretary of War declining to authorize such construction was not by reason of any

matter connected with navigation, but that *the only thing that the Secretary had in mind was that the project was against public policy and particularly opposed to the program contemplated by the Crampton Act and the proposed George Washington Memorial Parkway.*" (R. 38, italics ours.)

This program contemplated, *at some time in the uncertain future,* the acquisition for park purposes of lands along the Virginia shore of the Potomac River. (See Crampton Act, 46 Stat. 482, discussed in this brief at page 12.) While the application for the wharf permit had been under consideration, the Director of the National Park and Planning Commission had urged the Secretary of War to refuse to issue it, pointing out that if the wharf permit were granted the Sun Oil Company would take the property and would build tanks thereon, and that this would increase the amount that the Government would have to pay for the property when it was condemned, whereas if the wharf permit were refused, the Sun Oil Company would not take the property and would not build tanks, the result of which would be that when the Government ultimately acquired the property by condemnation it would not have to pay so much for it (R. 53, 54).

While the application was pending Charles H. Greathouse conveyed the land to his son and daughter-in-law, who are the relators (R. 39, 42, 43), and the original contract with the Sun Oil Company was extended by successive contracts, the last of which was dated August 1, 1930, between the relators Lucien H. Greathouse and Rebekah S. Greathouse and Sun Oil Company, provided in effect that the purchase of the property should be conditioned upon the granting of the wharf permit within three years after April 30, 1933 (R. 41, 42).* The Greathouses agreed to

*Sun Oil may withdraw from this contract by ninety days notice prior to the end of any yearly period after April 30, 1933, but unless it does so, is obligated to purchase the property if the permit has been granted (see provision (c) R. 42). The record does not indicate that such notice has been given, and in fact it has not.

make every reasonable effort to obtain the permit "by prosecuting to the courts of last resort, if necessary" (R. 42).

September 30, 1930, the petition for mandamus was filed against Patrick J. Hurley, as Secretary of War, and Lytle Brown, as Chief of Engineers (R. 2). General Brown answered briefly:

> "That the respondent * * * found that the proposed structure would not obstruct navigation in the waters of the Potomac River, and on, to wit, August 7, 1930, recommended the approval of the plans as set forth in the petition. The respondent has done all that the law requires him to do, and is without power to do anything further." (R. 12).

The defendant Patrick J. Hurley, as Secretary of War, filed an answer saying in effect that he was justified in declining to issue the permit, and praying that the petition be dismissed.

At a meeting of the National Capital Park and Planning Commission held September 25, 1931, (approximately one year after the petition for mandamus was filed), a resolution was adopted reciting that the Commission was authorized to occupy lands belonging to the United States necessary for development as parks, that the United States was the owner of certain land described in the resolution, including the part of the land involved in this suit immediately adjacent to the river. The resolution declared that

> "* * * this Commission * * * does hereby take possession of, and occupy, the said lands hereinafter described by actual survey which will include to center of the line of channel of the Potomac River in the District of Columbia, for the various purposes and intents as set forth in the said Act of Congress, and that such possession and occupation thus referred to, be complete and exclusive, and that a copy hereof be posted upon each of the group parcels of land hereinafter described." (R. 52).

Thereafter a representative of the Commission posted some copies of this resolution on stakes which were driven in the ground on the Greathouse property. These stakes were about 75 or 100 feet from the present shore line of the Potomac River, and "were placed there. . . .as being on the high water line of the Potomac River of 1863." (R. 56).*

The case was tried in the Supreme Court of the District of Columbia before Mr. Justice Luhring beginning January 25, 1932, (R. 38). March 24, 1932, an order was entered dismissing the petition, from which the petitioners appealed (R. 35). October 4, 1932, the case was first argued in the Court of Appeals. (R. 62). November 19, 1932, it was ordered restored to the calendar for rehearing. (R. 62). December 5, 1932, it was reargued (R. 62). January 16, 1933, the Court of Appeals entered an order affirming the decision of the Supreme Court of the District of Columbia, Mr. Justice Groner and Mr. Justice Hitz dissenting. (R. 83).

The grounds of this decision as stated in the majority opinion were:

1. The owner of lands in Virginia opposite the District of Columbia has no right to build a wharf into the Potomac River even though such wharf will not obstruct navigation.

2. In determining whether or not to issue a wharf permit the Secretary of War has "unlimited discretionary jurisdiction," and may take into consideration matters not connected with navigation.

3. Relators' rights are "conditional, contingent, prospective and inchoate," for the enforcement of which mandamus will not lie.

The dissenting opinion took the following view which we shall urge is the correct one:

*We do not think that this action had any effect on the rights of the parties, and mention it only so that our statement of facts will be complete. It is discussed herein at page 22.

1. The owner of lands in Virginia opposite the District of Columbia has the right to build a wharf into the Potomac, subject only to the condition that the same is not detrimental to the public interest in the navigation of the river. This is a property right expressly recognized by the Compact of 1785 between Maryland and Virginia which provided:

> "Seventh, The citizens of each state respectively shall have full property in the shores of Patowmack River adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river. * * *" *Maryland Laws*, Kilty Vol. 2, Nov. 1785, Chap. 1.

2. The only discretion conferred upon the Secretary of War by the Rivers and Harbors Act is in determining whether the proposed construction will obstruct navigation. When the Secretary finds that the wharf will not obstruct navigation, the discretion which the act confers is exhausted and the Secretary may not resort to another ground as the basis of a refusal to issue the permit.

3. "Appellants' property is useful only for wharf purposes, but that use gives it value. Without the permit the value is lost, and unless redress can be afforded here, it can be found nowhere else. The case is peculiarly one in which the writ should issue." (R. 82).

A petition for certiorari to this Court was filed February 9, 1933, and the writ was granted March 13, 1933.

March 27, 1933, George H. Dern, as Secretary of War, was substituted as one of the defendants in the place of Patrick J. Hurley.

## Specification of Errors to be Urged.

The Court of Appeals of the District of Columbia erred:

1. In failing to hold that an owner of lands bordering the Potomac in Virginia opposite the District of Columbia has the right to build a wharf if it does not obstruct or injure the navigation of the river.

2. In holding that the Secretary of War may refuse to issue a permit for a wharf by reason of matters other than those relating to navigation.

3. In holding that mandamus will not lie for the enforcement of the relators' rights.

## Summary of Argument.

The Secretary of War may not refuse to issue a permit for a wharf by reason of matters not relating to navigation.

The owner of land bordering the Potomac River in Virginia opposite the District of Columbia has the right to build a wharf if it does not obstruct or injure the navigation of the river. This right exists (a) by the common law of Maryland and Virginia, and (b) by the Compact of 1785 between Maryland and Virginia.

The relators, as the owners of land in Virginia bordering on the Potomac River, may maintain this action.

## Argument.

### I. The Secretary of War may not refuse to issue a permit for a wharf by reason of matters not relating to navigation.

The statute under which the Secretary of War acted is part of the Rivers and Harbors Act of March 3, 1899, 30

Stat. 1151, and is also contained in 33 U. S. C., Sec. 403, where it is entitled "Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in," as follows:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established,* except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

The substantive law of this act is contained in the first clause:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited."

The rest of the section is directory, entrusting its administration to the Chief of Engineers and the Secretary of War.

We recognize, of course, that there is a discretion confided to the Chief of Enginers and to the Secretary of War by this statute. If they find that a proposed construction

*No harbor lines have been established where the wharf is proposed (R. 15).

will obstruct navigation, that is the end of the matter unless it can be shown that the decision has no reasonable basis and is clearly arbitrary. But the discretion confided to these officials by the act is clearly a discretion only in regard to determining whether or not the proposed construction will in fact obstruct navigation. This is clear from:

> (a) The language of the act. It prohibits only the creation of obstructions to the navigable capacity of any of the waters of the United States.
>
> (b) The constitutional basis of the act. The act is not local to the District of Columbia, but is applicable throughout the United States wherever there are navigable waters. Congress derives its power to enact such legislation only from the commerce clause of the Constitution. *Gibbons v. Ogden*, 9 Wheat. 1; *Kansas v. Colorado*, 206 U. S. 46. Congress has power to prohibit wharves in navigable streams throughout the United States only to the extent that such wharves obstruct navigation, and Congress can give the Secretary of War no greater power.

Here the Chief of Engineers not only found that the proposed structure would not obstruct navigation, and recommended that the permit be granted (R. 12, 46), but he reported to the Secretary that

> "* * * there has not been a single objection to the construction of the wharf from the standpoint of navigation." (R. 46.)

In the majority opinion below appears the following statement:

> "The Secretary may well have concluded that the structure of the wharf in question, a short distance

above a bridge costing millions of dollars, would so alter or modify the course of the stream as to result in damage to the bridge." (R. 70.)

This statement does not purport to be based on anything in the record, and it is directly contrary to the stipulation made at the opening of the case as follows:

> "At the opening of the case the following agreement was made by counsel: Counsel for the defendants admits that the construction of the wharf, fender piles, etc., as applied for which is involved in this case will not obstruct navigation, and says that the decision of the Secretary of War declining to authorize such construction was not by reason of any matter connected with navigation, but that *the only thing* that the Secretary had in mind was that the project was against public policy and particularly opposed to the program contemplated by the Crampton Act and the proposed George Washington Memorial Parkway." (R. 38, italics ours.)

The Crampton Act referred to is the Act of May 29, 1930, 46 Stat. 482. It provides for the creation of the George Washington Memorial Parkway to include the shores of the Potomac and adjacent lands from Mount Vernon to a point above the Great Falls on the Virginia side. It is fair to say that this parkway *may* include part of the relators' land, but it is not correct to assume as did the court below that the relators' land will undoubtedly be taken, for the Crampton Act expressly provides:

> "As to any lands in Maryland or Virginia along or adjacent to the shores of the Potomac within the proposed limits of the parkway that would involve great expense for their acquisition and are held by said commission not to be essential to the proper carrying out of the project, the acquisition of said lands shall not be required upon a finding of the commission to that effect." 46 Stat. 483.

*In any event this development and the acquisition of any part of the relators' land by the United States is entirely in the future and perhaps in the distant future.* There is no justification for a statement made at the conclusion of the majority opinion below that "ample funds" have been "appropriated under the parking act to acquire the lands adjacent to the river for parking purposes" (R. 72). On the contrary, although certain funds have been "authorized to be appropriated" by the Crampton Act, 46 Stat. 482, no funds have as yet been appropriated to our knowledge, and the Crampton Act expressly provides:

> "Such funds shall be appropriated as required * * * *Provided*, That no money shall be expended by the United States for lands for any unit of this project until the National Capital Park and Planning Commission shall have received definite commitments from the State of Maryland or Virginia, or political subdivisions thereof or from other responsible sources for one-half the cost of acquiring the lands in its judgment necessary for such unit of said project deemed by said Commission sufficiently complete, other than lands now belonging to the United States or donated to the United States." 46 Stat. 482, 483.

There is no evidence that any such "definite commitments" have been received from the State of Virginia. As far as we know, no such commitments are in prospect, and in the present depression it is fanciful to believe that any such commitments will be received in the near future. Meanwhile, the decision of the majority below is that the owners of the land are to be prevented from developing its natural use as a water front.

The Director of the National Park and Planning Commission testified that while the Secretary of War had the application for the wharf permit under consideration, the Director urged the Secretary to refuse the wharf permit because if the wharf permit were granted the Sun Oil Com-

pany would take the property and would build tanks thereon, which would increase the amount that the Government would have to pay for the property when condemned, but if the wharf permit were not given the Sun Oil Company would not take the property and would not build tanks, the result of which would be that when the Government acquired the property by condemnation it would not have to pay so much for it (R. 53, 54). *Of course, the Government may take the property at any time by condemnation, but we respectfully submit that the Secretary of War may not lawfully prevent the natural development of the property for an indefinite period until the Government determines that it is ready to take it.*

In a very similar case, Attorney General Wickersham gave as his opinion that in determining whether permission should be given for the erection of a dolphin off the coast of Santa Barbara, California, for the purpose of unloading oil from steamers, the Chief of Engineers and the Secretary of War should not consider the injury to an adjacent bathing beach by reason of oil which would be spilled from the dolphin, or any other similar reason not having direct relation to the navigable capacity of the waters and their use for interstate or foreign commerce. The Attorney General advised the Secretary of War that such consideration should not prevent the approval of the plan, provided it would otherwise have the approval of the Chief of Engineers and the Secretary. Considerations of space deter us from quoting at length from this opinion, which demonstrates that

> "* * * the statute in question restricts the authority of the Secretary of War to very narrow limits." 27 Opinions Atty. Gen. 284, 287.

There are many decisions to the effect that an administrative officer or board to whom application is to be made for a permit may not refuse to grant it because of matters

disconnected with the questions that the officer or board should properly decide in his or its discretion as a basis for granting or refusing the permit. In such cases mandamus will lie. For example, in *New York v. Department of Health*, 226 N. Y. 209, the Board of Health had refused to issue a license for a hospital for the reason that—

> "considerable damage would accrue to the surrounding property if the permit were issued."

It was held that this reason did not come legally within the scope of the discretion of the Board and the writ of mandamus issued. To the same effect are *Jackman v. Public Service Commission*, 121 Kan. 141; *People v. Robinson*, 126 N. Y. S. 546, 141 App. Div. 656; *Empire Home Furnishers v. White*, 256 N. Y. S. 451, 145 Misc. Rep. 285; *Nicodemus v. State*, 82 Okla. 152; *Coyne v. Prichard*, 272 Pa. 424; *Wright v. France*, 279 Pa. St. 22; *State v. Mayor*, 94 W. Va. 189.

The discretion conferred upon the Secretary of War by the statute was to ascertain whether the granting of a permit would obstruct navigation. He exercised this discretion and found that navigation would not be obstructed. There remained then only the ministerial duty to grant the permit. To compel the performance of this duty the writ of mandumus will issue. *Marbury v. Madison*, 1 Cranch 137.

**II. The owner of land bordering the Potomac River in Virginia opposite the District of Columbia has the right to build a wharf if it does not obstruct or injure the navigation of the river.**

This precise point has never come before this Court for decision. It has been established that the jurisdiction of the District of Columbia goes to the high-water mark of

the Potomac River on the Virginia shore. *Marine Railway Company v. United States*, 257 U. S. 47; *Smoot Sand & Gravel Corporation v. Washington Airport*, 283 U. S. 348. But these cases are in no way inconsistent with the contention that Virginia landowners have the right to build wharves which do not obstruct navigation, and they contain language which indicates an agreement with this view, for example:

> "As stated in 257 U. S. 64, Article 7 (of the Compact of 1785) gave the citizens of each State full property in the shores of the River adjoining their lands and the privilege of carrying out wharves * * *."—*Smoot Sand & Gravel Corporation v. Washington Airport, Inc.*, 283 U. S. 348, 351.

## A. AT COMMON LAW.

It was assumed by the trial court (R. 23) and by the Court of Appeals (R. 67) that, because by the common law of England the construction of a wharf in navigable water was an invasion of the King's *jus privatum* and a purpresture which might be abated, the same rule applied in the Potomac, so that a wharf from the Virginia shore might be abated at any time by the sovereignty which owned the bed of the stream. This assumption overlooked the fact that conditions were so different in Colonial Maryland and Virginia that the common law in those Colonies differed from that of England.

Thus in *Shively v. Bowlby*, 152 U. S. 1, in referring to the right to build a wharf, this Court said:

> "The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as has been modified by the charters, constitutions, statutes *or usages* of the several Colonies and States, or by the Constitution and laws of the United States." (p. 14, italics ours.)

"The governments of the several Colonies, with a view to induce persons to erect wharves for the benefit of navigation and commerce, early allowed to the owners of lands bounding on tide waters greater rights and privileges in the shore below high water mark, than they had in England. But the nature and degree of such rights and privileges differed in the different Colonies, and in some were created by statute, while in others they rested upon usage only." (p. 18).

The navigable streams of Maryland and Virginia were great tidal rivers, in magnitude far beyond anything known in England, and the life of those Colonies was centered in plantations bordering these rivers, each plantation with its own wharf from which tobacco and other products were shipped to England. The wharf was a necessity of plantation life, and by usage in these Colonies the landowners bordering these tidal streams were permitted to build and maintain their wharves, so long as they did not interfere with navigation.

"Such luxuries as were desired, books, wines, silk and laces, were brought from London to the planter's wharf in exchange for his tobacco; * * *" *Virginia*, by John Esten Cooke, p. 371.

"The planter needed no port when ships from London or Bristol, Boston or Jamaica, brought wine, sugar, salt-fish, English and Dutch wares to his very door, and loaded tobacco and maise at his own wharf." *Maryland*, by William Hand Browne, pp. 159, 160.

"This is the Potomac of the landings—of the old wharves supported by the leaning piles and protected at their corners by the high cable-lashed clusters of stout oak; * * * of the clipper ships from England and the Spanish Main, * * * the schooners and sloops and gilling skiffs; of the long stretches of leisurely peace over an almost unbroken span of three hundred years. * * * The landings are frequent. * * *

> "The old landings themselves indeed reach out from the shores of yesterdays. * * * the square-rigged clippers from England bring luxuries and dainties to the planters and their dames; the landings bend and creak or straighten and steady under the tobacco cargoes; * * *" *Potomac Landings,* by Paul Wilstach, pp. 3, 9 and 10.

This difference between the common law of England and America is well recognized. For example, in a note in 40 L. R. A. 635, it is stated that in England there were several adverse rights to be considered in determining whether or not a riparian owner had a right to construct a wharf, first, the navigator's right to land his goods; second, the King's *jus privatum* in the soil covered by water; and, third, the *jus publicum* which was the right to have the water kept free from obstructions for the purpose of navigation. The note then continues:

> "In this country there was only the right of the riparian owner and the *jus publicum* to be considered. In the early days the navigable channels were in most cases ample, the need of wharves urgent, and the public funds deficient. So, by common consent, supplemented in some instances by legislation, the riparian owner was permitted to erect wharves, and his right to do so was unquestioned."

And this Court held in *United States v. River Rouge Co.,* 269 U. S. 411, 418,

> "It is well settled that in the absence of a controlling local law otherwise limiting the rights of a riparian owner upon a navigable river, *Shively v. Bowlby,* 152 U. S. 1, 40, he has, in addition to the rights common to the public, a property right, incident to his ownership of the bank, of access from the front of his land to the navigable part of the stream, and when not forbidden by public law may construct landings, wharves or piers for this purpose. * * *

"This right of a riparian owner, it is true, is subordinate to the public right of navigation, and subject to the general rules and regulations imposed for the protection of such public right."

In *Norfolk City v. Cooke*, 27 Grat. 430, the Court of Appeals of Virginia stated,

"These rights both *at common law* and by statute, are secured to the riparian owner, to erect wharves, piers, or bulkheads for his own use or the use of the public, subject only to such general rules and regulations as the legislature may prescribe; and the only limitation upon such right is, that navigation may not be obstructed, or the rights of others injured. *This is the common law rule.* * * * (Italics ours.)

"This right of the riparian owner is not a mere license or privilege, but is *property*, property in the soil, up to the line of navigability, though covered by water; for the wharf, pier or bulkhead, can only be built on the soil." (Italics are the court's.)

In *Baltimore & Ohio R. R. Co. v. Chase*, 43 Md. 23, 34, the Court of Appeals of Maryland said,

"*By the common law* it is well settled, that where land lies adjacent or contiguous to a navigable river * * * (the owner has the right to accretion). And in addition to this right by reliction or accretion, the riparian proprietor, whose land is bounded by a navigable river, whether his title extends beyond the dry land or not, has the right of access to the navigable part of the river from the front of his lot, and the right to make a landing, wharf or pier for his own use, or for the use of the public, subject to such general rules and regulations as the Legislature may think proper to prescribe for the protection of the rights of the public, whatever those rights may be. * * *

"These riparian rights, *founded on the common law*, are property, and are valuable, and while they must be enjoyed in due subjection to the rights of the public, they cannot be arbitrarily or capriciously destroyed or

> impaired. They are rights of which, when once vested, the owner can only be deprived in accordance with the law of the land, and, if necessary that they be taken for public use upon due compensation." (Italics ours.)

Thus, by the usage of over three hundred years in Maryland and Virginia, the riparian owner has been allowed to maintain a wharf into navigable water, and the highest courts of both states have declared that the riparian owner has such a right at *common law*; and that the right is property.

## B. BY THE COMPACT OF 1785.

But whatever may have been the effect of the usage of Maryland and Virginia in Colonial days as to wharves, the right to build a wharf into the Potomac from the Virginia shore was expressly recognized and legalized as a property right by the Compact of 1785 between Virginia and Maryland, and has been maintained unimpaired by subsequent legislation down to the present time.

By the Compact of 1785 entered into between commissioners appointed by Maryland and Virginia, it was provided:

> "Seventh, The citizens of each state respectively shall have full property in the shores of Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river * * *." *Maryland Laws*, Kilty, Vol. 2, Nov. 1785, Chap. 1.

This Compact was ratified by the legislature of Maryland, March 12, 1786, by an act which recited the Compact and thereafter provided:

"Be it enacted, by the General Assembly of Maryland, That the said compact is hereby approved, confirmed and ratified, and that as soon as the said compact shall be approved, confirmed and ratified, by the general assembly of the Commonwealth of Virginia, thereupon, and immediately thereafter, every article, clause, matter and thing, in the same compact contained, shall be obligatory on this State and the citizens thereof, and shall be forever faithfully and inviolably observed and kept by this government, and all its citizens, according to the true intent and meaning of the said compact; and the faith and honour of this State is hereby solemnly pledged and engaged to the general assembly of the Commonwealth of Virginia, and the government and citizens thereof, that this law shall never be repealed or altered by the legislature of this government, without the consent of the government of Virginia." *Maryland Laws*, Kilty, Vol. 2, Nov., 1785, Chap. 1.

The Compact was also ratified by the legislature of Virginia, on March 28, 1785, 12 Hening, Va. Stat., p. 50.

In 1789 and 1791, respectively, Virginia and Maryland ceded to the United States the territory which became the District of Columbia. In the Maryland act of cession there was a proviso as follows:

"* * * nothing herein contained shall be so construed to vest in the United States any right of property in the soil, as to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States, * * *" *Maryland Laws*, Kilty, Vol. 2, November, 1791, Chap. 45, Sec. 2.

The Virginia act of cession contained a proviso in practically the same language, 13 Hening, Va. Stat., p. 44, Sec. 2.

The Organic Act of the District of Columbia of 1801, 2 Stat. 103, D. C. Code, p. 449, provided:

> "That the laws of the State of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia, which was ceded by the said State to the United States, and by them accepted for the permanent seat of government; and that the laws of the State of Maryland, as they now exist, shall be and continue in force in that part of the said district, which was ceded by that State to the United States, and by them accepted as aforesaid."

In 1846 there was a recession to Virginia of the territory ceded by her to the United States, and this Act provided:

> "* * * all the rights and jurisdiction therewith ceded over the same, be, and the same are hereby, ceded and forever relinquished to the State of Virginia, in full and absolute right and jurisdiction, as well of soil as of persons residing or to reside thereon." 9 Stat. 35, 36.

In addition to the right of landowners on the Virginia shore of the Potomac to build wharves therefrom according to the common law of Maryland and Virginia prior to 1785, we maintain that after the Compact of 1785 such landowners had "full property in the shores of the Patowmack river adjoining their lands, and the privilege of making and carrying out wharves and other improvements so as not to obstruct or injure the navigation of the river," that this became the law of Virginia by the Virginia Statute of 1789 and the law of Maryland by the Maryland Statute of 1791, that it became the law of the District of Columbia by the Organic Act of 1801, adopting the laws of Virginia and Maryland, that while the property was within the District of Columbia no legislation purported to affect this right to build wharves from the Virginia shore, and that the Act of 1846 receding the territory to Virginia ended all possibility of Congress affecting the right to build such wharves.

> "The original state of things was not changed by the grant of Virginia and the regrant by the United States of the part of the District on the Virginia side." *Marine Railway Co. v. United States*, 257 U. S. 47, 63.

Virginia landowners on the Potomac opposite the District of Columbia thus have "full property in the shores * * * and the privilege of making and carrying out wharves * * * so as not to obstruct or injure the navigation of the river."

For an analysis of the decisions dealing with the river, including *Maryland v. West Virginia*, 217 U. S. 577; *Marine Railway Company v. United States*, 257 U. S. 47; *Smoot Sand & Gravel Corporation v. Washington Airport, Inc.*, 283 U. S. 348; and *Evans v. United States*, 31 App. D. C. 544, reference is made to the opinion of Mr. Justice Groner (R. 73-80).

## III. The Relators as the owners of land in Virginia bordering on the Potomac River may maintain this action.

While the concluding paragraphs of the majority opinion below contain language which may leave the reader in doubt as to whether the relators are the owners of land bordering on the river, there is in fact no question on that point.

At the conclusion of the majority opinion the statement is made:

> "It was conceded in the argument in this court that notices had been posted upon the lands, and that action has been taken in the Supreme Court of the District of Columbia to determine the title to these lands." (R. 72).

It is true that long after the petition for mandamus was filed and shortly before the trial the Park and Planning

Commission passed a resolution that a part of the land belonged to the United States and posted some notices on the land (R. 56), a proceeding which could not affect the title and which the trial justice jocosely called "homesteading." (R. 56.) The record, however, does *not* show that any action has been taken in the Supreme Court of the District of Columbia to determine the title to these lands, the court below is mistaken in understanding that any such concession was made in the argument, and no such suit has in fact been filed.

The trial court expressly found in the opening paragraph of its opinion that the wharf was to be—

> "in the Potomac River on the Virginia shore adjacent to the land owned by the relators." (R. 19.)

The relators showed (R. 39, 40, 48) and the trial court so found (R. 19) that their predecessors in title had owned land bordering on the Potomac River, that there had been a gradual and imperceptible increase to the land either by alluvium or by a gradual, imperceptible receding or dereliction of the water.

> "The rule, everywhere admitted, that where the land encroaches upon the water by gradual and imperceptible degrees, the accretion or alluvion belongs to the owner of the land, is equally applicable to lands bounding on tide waters or on fresh waters, and to the King or the State as to private persons; and is independent of the law governing the title in the soil covered by the water." *Shively v. Bowlby*, 152 U. S. 1, 35.

> "* * * when a tract of land lies adjacent or contiguous to a navigable river or water, any increase of soil formed by the waters gradually or imperceptibly receding or any gain by alluvion in the same manner, shall, as a compensation for what it may lose in other respects, belong to the proprietor of the adjacent or contiguous land." *Giraud's Lessee v. Hughes*, 1 Gill & J. 249, 264.

The majority opinion below says that this suit is part of "a land speculation" and that the matters involved are "conditional, contingent, prospective and inchoate," for which reason the Court below holds that the writ may not issue.

There is no land speculation involved and the interest of the relators is a very real one. The present relators are the son and daughter-in-law (R. 42, 43) of Charles H. Greathouse, the former owner of the land, who had contracted to sell it to Sun Oil Company if a wharf permit could be obtained (R. 41). This contract provided that the application might be made by Greathouse "at his own option, either in his name or in the name of Sun" (R. 41). The application was made in the name of the Sun Oil Company (R. 47). That was the simple, natural way to make the application, inasmuch as the Sun Oil Company was going to use the wharf and the Sun Oil Company's engineers would naturally prepare the plans. On the contrary, it would have been somewhat underhanded for Greathouse to have made the application in his own name when he had theretofore contracted to sell the land to Sun if the permit were granted. The statement in the application that Sun owned the land was correct to the extent that Sun had contracted to buy the land if the permit were granted. The title and interest of the Sun Oil Company is inextricably involved with the title and interest of the relators. They both may be said to have title to the land, the Greathouses still holding legal title and the Sun Oil Company having an equitable title under its contract of purchase, *Pomeroy's Equity Jurisprudence*, 4th Ed., Vol. 1, Secs. 105, 368, *Story's Equity Jurisprudence*, 14th Ed., Vol. 3, Sec. 1612, subject only to the issue of the wharf permit to which it was entitled. The Chief of Engineers expressly found:

> "The Sun Oil Company has secured all the authority that is necessary to build its establishment on the shore in Virginia." (R. 46.)

The question of who owned the land or in whose name the application was made had nothing to do with the Secretary's denial of the application.*

The relators now own the land. If the permit is granted they can sell the land to the Sun Oil Company (R. 41). If it is not granted they cannot make the sale (R. 41). Under their contract with Sun Oil Company they must endeavor to secure the permit by such litigation as may be appropriate (R. 42). They are certainly interested in the land to which they hold legal title, in the contract of sale to which they are now parties, and in the application which was made for their benefit and the granting of which is a condition precedent to the sale of the land. We respectfully submit that the view taken by Mr. Justice Groner is the correct one where he said,

> "Appellants' property is useful only for wharf purposes, but that use gives it value. Without the permit the value is lost, and unless redress can be afforded here, it can be found no where else. The case is peculiarly one in which the writ should issue." (R. 82.)

## Conclusion.

It is therefore urged that the decision of the Court of Appeals of the District of Columbia be reversed, with a direction that the writ of mandamus issue as prayed.

Respectfully submitted,

J. Harry Covington,
John Marshall,
Spencer Gordon,
*Attorneys for Petitioners.*

*The majority opinion seems to suggest that the permit was denied because "upon investigation" it appeared "that the Sun Oil Company was not the owner of the property" (R. 69). If this is what the Court meant, we respectfully submit that such a holding is not warranted by anything in the record, and is completely refuted by the stipulation frequently referred to in this brief which gave the Secretary's reasons for his decision (R. 38).

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# Supreme Court of the United States

No. 677, October Term, 1932.

The United States of America, on Relation of Lucien H. Greathouse and Rebekah S. Greathouse, *Petitioners*,

*v.*

George H. Dern, as Secretary of War, and Lytle Brown, as Chief of Engineers.

Certiorari to the Court of Appeals of the District of Columbia.

## REPLY BRIEF FOR PETITIONERS.

We shall adopt the order of argument followed in the brief for the respondents, so that the points of agreement and divergence may be clear:

### I. Mandamus is the proper remedy.

(A) Respondents' counsel contend that Section 10 of the Rivers and Harbors Appropriation Act of 1899 authorizes, but does not require, action by the Secretary of War, in that the section prohibits the building of structures in navigable waters without his authority, but contains no direction to him to issue a license if there is no obstruction. It

is our contention that no *express* direction to the Secretary is necessary. The statute designates the Secretary of War as the official to whom application for permits shall be made, and the statute states the circumstances under which the Secretary is *not* to issue the permit. If the Secretary finds that these circumstances do not exist there remains the simple, plain and mandatory duty of the Secretary to issue the permit to a person who is entitled to have one, and who cannot build a wharf without such a permit.

For mandamus it is not necessary that the statute shall *expressly* direct that a thing be done. Thus in the leading case on mandamus, *Marbury v. Madison*, 1 Cranch 137, the action was brought to compel the Secretary of State to deliver to the plaintiffs their commissions as justices of the peace. The plaintiffs had been appointed and confirmed and their commissions signed by the President and sealed with the seal of the United States. The statute required the Secretary of State to affix the seal to commissions. It did not *expressly* command the Secretary to deliver the commissions, but the Court held (pp. 162, 172):

> "To withhold his commission * * * is an act deemed by the court not warranted by law * * *.
>
> "It is true, that the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute. It is to deliver a commission; on which subject, the acts of congress are silent. This difference is not considered as affecting the case."

In the more recent case of *Hoover v. Intercity Radio Co.*, 52 App. D. C. 339, 286 F. 1003 (dismissed per stipulation 266 U. S. 636), a statute required radio stations to be licensed by the Secretary of Commerce. Although there was no express provision that the Secretary *should* issue a license, the court held that his duty to do so was mandatory.

A statute providing that a wharf could not be built in navigable waters without a permit but including no means

of securing a permit if the wharf did not obstruct navigation would be beyond the constitutional power of Congress, whose only control over rivers is in regard to navigation (see petitioner's brief page 11).

It has been repeatedly held by this Court that the fact that a statute must be interpreted is not a test of whether a duty is a ministerial one.

> "If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief." *Roberts v. United States*, 176 U. S. 221, 231.

In that case the statute was in fact rather obscure, but *as construed by the Court* it involved a ministerial duty in which the Secretary had no discretion. The writ of mandamus therefore issued. The quotation was repeated in *Lane v. Hoglund*, 244 U. S. 174, 182, and again in *Work v. McAlester-Edwards Co.*, 262 U. S. 200, 208.

As stated in the petitioners' brief, the discretion conferred upon the Secretary of War by the statute was to ascertain whether the granting of the permit would obstruct navigation. He exercised this discretion and found that navigation would not be obstructed. There remained then only the ministerial duty to grant the permit. To compel the performance of this duty, the writ of mandamus will issue.

The case is wholly different from *Sanitary District v. United States*, 266 U. S. 405, where the Secretary of War found that a further diversion of water from Lake Michigan *would* obstruct navigation. That finding, of course, was within his discretion and would not be reviewed. All of the cases cited by the respondents on this point involve discretion or quasi judicial functions.

(B) There is no question as to the relators' title. This suit is not brought to determine title, and it cannot possibly determine title. Certainly neither the Chief of Engineers nor the Secretary of War claims title to any of the property involved in the case, and no judgment in this case can possibly preclude anyone other than the parties to the suit. The question of title is only important in view of the fact that it has been suggested that the relators are not owners of land adjoining the Potomac River, and thus have no standing in Court.

But to *assert* that there is a dispute as to the relators' title is to assert a mere conclusion. There is *in fact* no dispute about it as far as this case is concerned. The relators have proved that they and their predecessors in title held possession under deeds conveying property bounded on the north by the river (R. 39, 40, 44, 48), and this would be a sufficient showing of title to establish a prima facie case even in an action of ejectment,

> "* * * a title prima facie is shown by a grant from some one who held possession, or by such grant and possession under it by the grantee. * * * If the objector has a better or stronger title than the prima facie title proved, then he must show it, and until he does the prima facie title prevails. * * *"
> 9 R. C. L. 843, Ejectment, Par. 15.

See also 9 R. C. L. 915, *Bradshaw v. Ashley*, 14 App. D. C. 485, 504; *Chesapeake B. R. Co. v. Washington Co.*, 23 App. D. C. 587, 594.

If the contention of the respondents were well founded *every* application for mandamus could be defeated by the mere assertion that the relators' interest is contested.*

## II. The Relators have the right to build a wharf from their land into the Potomac River.

(a) We admit that the United States has title to the land below the high-water mark. We contend, however, that during the Colonial period in Maryland and Virginia a common law right to build wharves in the Potomac and the other great tidal rivers became established. It is reasonable to believe that such a right was established before 1688, the date of the grant to Lord Culpeper. Certainly it was eventually established. (See relators' brief, pp. 16 to 20.)

(b) The relators agree that they acquired no right by prescription based on the use of a particular wharf. As stated in the plaintiffs' brief, we contend that by usage from earliest times in Maryland and Virginia the riparian owner has been conceded the right to maintain a wharf into navigable water, and that the highest courts of both states have declared that the riparian owner has such a right at *common law*, and that the right is *property*. (See relators' brief, pp. 18, 19). We agree that the law of Maryland is controlling rather than the law of Virginia. The law of Virginia is interesting, however, in that it agrees with that of Maryland, and illustrates the method of early plantation commerce that existed in those colonies on the Potomac and the other great tidal rivers and bays. We have cited decisions of the highest courts of Maryland and Virginia to the effect that the right to wharf out to navigable water existed at common law and was property. (See

*Section 1278 of the Code of the District of Columbia expressly provides for the trial of issues of fact in actions of mandamus, 31 Stat. 1189, 1390.

relators' brief, p. 19.) We agree that the statement to that effect in *Baltimore & Ohio Railroad Co. v. Chase,* 43 Md. 23, 34, is dicta, but we assert that the dicta of the highest court of the state should be considered a correct statement of the law of that state, especially in the absence of any decision to the contrary.

Counsel for the respondents argue that the fact that statutes were enacted in Maryland in regard to wharves in particular localities indicates that there was no right to build a wharf at common law. We do not regard this argument as well founded. It is more reasonable to suppose that there was a right to build a wharf at common law as asserted by the highest court of Maryland, and that the plantation owner undoubtedly had such a right, but that when a city or town was established a special statute would be enacted to encourage and control the building of wharves in that particular locality.

Counsel for the respondents further argue that the fact that the Compact of 1785 provided that the citizens of each state should have full property in the shores of the Potomac adjoining their lands and the privilege of making and carrying out wharves is evidence that no general right of wharfage existed prior to the Compact. We do not think that this argument is well founded. We believe that it is more reasonable to consider that the Compact of 1785 in that respect recognized and affirmed existing rights rather than created new rights.

The respondents' brief does not agree with our statement that the wharf was a necessity of plantation life in Maryland and Virginia, and that by usage in these Colonies the owners of the great plantations bordering tidal streams did in fact build and maintain their wharves. As authority for this in addition to the quotations in respondents' brief at page 17, see *History of Maryland,* Allan, p. 23; *History of Maryland,* Andrews, p. 60; *The Planters of Colonial Virginia,* Wettenbaker, p. 29. We venture to say

that statements to the same effect can be found in *any* book dealing with life in Colonial Maryland or Virginia, as for example in Thackeray's famous novel *The Virginians,* chapter 3, third paragraph.

(C) The respondents contend that the Compact of 1785 between Maryland and Virginia is not in force in the District of Columbia and that the relators have no rights arising therefrom. It is true that some of the decisions contain general statements to the effect that the citizens of Virginia and Maryland were not parties to the Compact, that after the cession to the District of Columbia the Compact was under the control of Congress, *Georgetown v. Alexandria Canal Co.*, 12 Peters 91, 96; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S., 672, 675, and even that the Compact was never in effect in the District of Columbia, *Evans v. United States*, 31 App. D. C. 544, 550, *Herald v. United States*, 52 App. D. C. 147. In *Smoot Sand & Gravel Corporation v. Washington Airport, Inc.*, 283 U. S. 348, 351, however, this Court speaks of the Compact as giving a right to build wharves.

These decisions should be considered with regard to the facts in each case. The Compact of 1785 had several aspects. Primarily it had to do with commerce and navigation, but it also affirmed the right of the Virginia landowner to build a wharf to navigable water. This right which existed at common law in Virginia and Maryland as a property right (see p. 19 relators' brief) was reaffirmed as a property right in the Compact in this language:

> "Seventh, The citizens of each state respectively shall have full property in the shores of Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river * * *." *Maryland Laws*, Kilty, Vol. 2, Nov. 1785, Chap. 1.

None of the decisions arising in the District of Columbia courts have dealt with the right to build a wharf into the Potomac River from the Virginia shore. We shall review them briefly:

In *Georgetown v. Alexandria Canal Co.*, 12 Peters 91, the mayor and council of Georgetown brought suit to restrain the building of an aqueduct across the Potomac on the ground that it injured navigation in violation of the Compact of 1785. The Court held primarily that the plaintiffs did not have a sufficient interest to bring the suit. It was further stated that after the cession by Maryland and Virginia to the District of Columbia Congress had full power to create bridges or aqueducts within the District.

In *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, the plaintiffs were in possession of a tract of land bordering on Water Street which was on the margin of the river, and claimed that the riparian rights on the side of the street opposite their tract attached to it. The case turned on the history of the real estate titles. The decision was that the plaintiffs were not riparian owners, because the street intervened between their property and the river.

*Morris v. United States*, 174 U. S. 196, held that the title to the Potomac flats adjacent to the District of Columbia was in the United States as successor to Maryland. It was held that the grant to Lord Baltimore of the navigable water and the soil under it was

> "as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, and not as private property, to be parcelled out and sold for his own individual emolument".

For this reason the soil under the river passed not to the heirs of Lord Baltimore, but to Maryland and later to the United States, which now holds for the same purposes.

*Evans v. United States*, 31 App. D. C. 544, and *Herald v. United States*, 52 App. D. C. 147, were both criminal

cases, involving the convictions of men who stood on the Virginia shore and fished below high-water mark in violation of the District of Columbia police regulations. It was held that the boundary ran to high-water mark, and that any right that a citizen of Virginia had to fish in the District of Columbia was subject to the police regulations of the District.

*Marine Railway Co. v. United States*, 257 U. S. 47, was an action of ejectment to recover filled land in the Potomac River adjacent to Virginia property.

> "Except as to an insignificant portion * * * which it is agreed may be disregarded, this strip lay below low water mark".

It was held that the United States had title, that it could fill the land under the river and that such filled land belonged to the United States.

*Smoot Sand & Gravel Corporation v. Washington Airport, Inc.*, 283 U. S. 348, was a suit to enjoin a contractor operating under Government contract from excavating and filling lands on the south shore of the Potomac. The Court decided that the boundary line was at high-water mark and this was the sole question involved in the case.

Certainly none of these cases have decided adversely our contention that the Compact of 1785 reaffirmed the common law right of the Virginia landowner to build a wharf into the Potomac. If he did not have such a right at common law, the Compact of 1785 and its adoption by the Maryland Act 1786 gave him the right to wharf into the Potomac. This right is declared to be "property" in the Compact. In Maryland the right to wharf is considered a property right, *Baltimore & Ohio R. R. Co. v. Chase*, 43 Md. 23, 34; *Page v. Mayor*, 34 Md. 558; *Wilson v. Iuloes*, 11 Gill & J. 351, 359. The relators as owners of the riparian land still have this property right, as the act of cession to the District of Columbia expressly provided:

> "* * * nothing herein contained shall be so construed to vest in the United States any right of property in the soil, as to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States, * * *" *Maryland Laws*, Kilty, Vol. 2, November, 1791, Chap. 45, Sec. 2.

(D) The decisions in *Shively v. Bowlby*, 152 U. S. 1, and *Marine Railway Co. v. United States*, 257 U. S. 47, relied on by the respondents have no important bearing on the questions in this case.

The decision in *Shively v. Bowlby, supra*, turned upon the construction of a statute of Oregon. This statute did not purport to give or recognize any *property rights* as did the Compact of 1785, nor had there been established in Oregon any common law right to build and maintain wharves, by usage of hundreds of years recognized by the highest courts of the state, as in Maryland and Virginia. The situation was totally different in the Columbia River from that in the Potomac. Thus in the very case of *Shively v. Bowlby, supra*, this Court pointed out, p. 26:

> "The foregoing summary of the laws of the original States shows that *there is no universal and uniform law upon the subject;* but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. *Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.*" (Italics ours.)

In *Marine Railway Co. v. United States*, 257 U. S. 47, this Court said (p. 65):

> "The only question before us is of the rights of the United States to fill land that hitherto has been under water."

Counsel for the respondents argue that if the United States can fill the land under the Potomac "it must follow that the relators had no right to build a wharf on the land against the objection of the United States". This appears to us to be a *non sequitur*. The United States may have the right to fill in the land now covered by the Potomac River in front of relators' property, *but until the United States does so the relators have the right to build a wharf into the river from their land.* Should the United States ultimately fill the land now under the river, other questions will arise which are not involved in this case. Such a possibility was contemplated by this Court in *Marine Railway Co. v. United States, supra,* when the Court said at the conclusion of the opinion in that case:

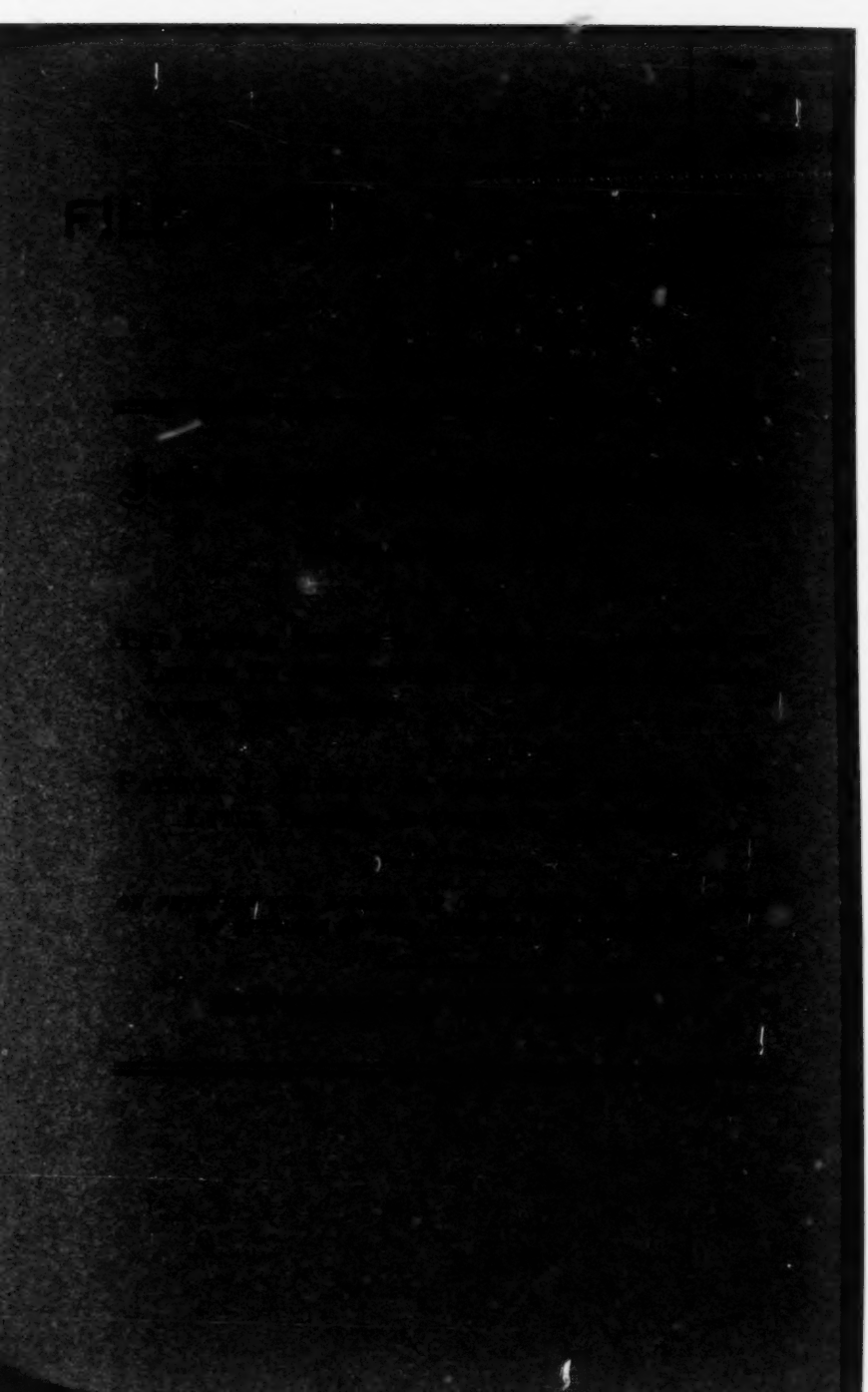
> "It may happen that such filling as is done in this case will interrupt previously existing access to the water front. But that does not affect the right of the United States to possession of the land. What other rights, if any, the plaintiff in error may have does not concern us now."

## Conclusion.

It is therefore urged that the decision of the Court of Appeals of the District of Columbia be reversed with direction that the writ of mandamus issue as prayed.

Respectfully submitted,

J. Harry Covington,
John Marshall,
Spencer Gordon,
*Attorneys for Petitioners.*



# In the Supreme Court of the United States

OCTOBER TERM, 1932

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No. 677

THE UNITED STATES OF AMERICA ON RELATION OF Lucien H. Greathouse and Rebekah S. Greathouse, petitioners

*v.*

PATRICK J. HURLEY, AS SECRETARY OF WAR, AND Lytle Brown, as Chief of Engineers

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA*

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## MEMORANDUM FOR THE RESPONDENTS

The respondents do not oppose the granting of a writ of certiorari in this case.

The primary questions involved are (1) whether the Secretary of War in his discretion may deny a permit under the River and Harbors Act (Act of March 8, 1899, c. 425, 30 Stat. 1121, 1151) to build a wharf in the Potomac River, not on the ground that the structure will interfere with navigation but because it will hinder another public use of the

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land not connected with navigation, and (2) whether the nature of the interest of the Federal Government in the bed of the Potomac River to high-water mark on the Virginia side is that of a proprietor or only that of a trustee for the public in the interest of navigation. Both of these questions are important and merit review by this Court.

Certain other questions are also involved, including the question whether mandamus may issue, although title to the upland area is in dispute, whether mandamus may be had to enforce a private contract and to establish rights which are conditional and inchoate, and whether the present suit has been brought by the proper parties. These questions may also affect the right of the relators to the relief sought, and reference is made to them here so that they may be presented more fully if this Court grants the writ of certiorari prayed for.

The problems involved in this controversy affecting as they do the plans for development of extensive public improvements, are of importance and should be definitely settled in the interest of the Government and of a large class of property owners who may be similarly situated to the petitioner. Therefore, we do not oppose the granting of the writ.

THOMAS D. THACHER,
*Solicitor General.*

FEBRUARY, 1933.

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# In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 677

THE UNITED STATES OF AMERICA ON RELATION OF Lucien H. Greathouse and Rebekah S. Greathouse, petitioners

*v.*

GEORGE H. DERN, AS SECRETARY OF WAR, AND LYTLE Brown, as Chief of Engineers

*ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA*

## BRIEF FOR THE RESPONDENTS

### OPINIONS BELOW

The opinion of the Court of Appeals of the District of Columbia (R. 63–72) is reported in 63 F. (2d) 137. The opinion of the Supreme Court of the District of Columbia (R. 19–34) is not reported.

### JURISDICTION

The judgment below was entered January 16, 1933 (R. 83). The petition for a writ of certiorari was filed February 9, 1933, and was granted March

13, 1933. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether proceedings by mandamus are appropriate to direct action of an executive officer of the Federal Government, where

   (*a*) The statute under which relators claim imposes no duty upon the officer;

   (*b*) A bona fide dispute concerning rights in land is involved, and would have to be decided in determining whether mandamus should issue.

2. Whether relators have any rights sufficient to justify their encroaching upon lands owned by the United States.

## STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra*, p. 45.

## STATEMENT

This proceeding was instituted by a petition for a writ of mandamus to compel the Secretary of War to issue a permit to the Sun Oil Company, a corporation, for the construction of a wharf in the Potomac River on the Virginia shore (R. 2–9). The facts may be summarized as follows:

Petitioners since April 29, 1930, have been the owners in fee simple of certain described lands situated above high-water mark upon the Virginia

shore of the Potomac River and alleged to be adjacent to the navigable waters thereof (R. 2–4, 6). On June 24, 1929, their predecessor in title contracted to sell the property to the Sun Oil Company, the sale being contingent upon the granting of permission to erect tanks and other equipment on the land and to construct wharves, piers, and moorings out from and in front of the property into the Potomac River (R. 40–41).

The agreement between the Sun Oil Company and petitioners' predecessor was to expire on December 31, 1929, but in November of that year it was extended to April 5, 1930 (R. 41). On May 9, 1930, the petitioners and the Sun Oil Company entered into an agreement which repeated the terms of the original contract and which extended the expiration date to August 1, 1930 (R. 41, 6). On that date the contract was extended by agreement to April 30, 1933, conditioned upon the granting prior to that date of such permits as are legally necessary for the construction of wharves and other structures in the Potomac River; provision was made for a renewal of the contract for a three-year term following April 30, 1933, in the event that the permits should not have been obtained before that date and it was agreed that petitioners would "continue their efforts and make every further reasonable endeavor to deliver or cause to be approved * * * permission to construct a wharf in the Potomac River opposite the land owned by parties of the first part by prosecuting to

the courts of last resort, if necessary, their right to said permit or permission. Parties of the first part shall have all benefits and inchoate rights resulting from the efforts of party of the second part to obtain permits" (R. 41–42).

On October 24, 1929, the Sun Oil Company made application in its own name to the Chief of Engineers for permission to construct a wharf into the Potomac River "approximately 400 yards above the Key Bridge at Rosslyn, Virginia" (R. 6, 47). The application stated that the company owned the land in front of which the wharf was to be built (R. 47).

This application was considered by the respondent Brown, Chief of Engineers, who found that the proposed structure would not obstruct navigation in the Potomac River and recommended to the Secretary of War that the permit be granted (R. 7, 45–47). On August 15, 1930, the Secretary of War denied the application and refused to issue the permit (R. 7, 10–11).

Upon these facts, petitioners brought suit for mandamus in the Supreme Court of the District of Columbia to compel the Secretary of War to issue the permit to the Sun Oil Company for the construction of the wharf. It was alleged that under Section 10 of the Rivers and Harbors Appropriation Act of 1899, the Secretary of War could refuse permits only when the proposed structure would be an obstruction to navigation. It was alleged that the Secretary of War had refused to authorize the wharf now in question not on the

ground that it obstructed navigation, but upon considerations involving the development of public parks and other matters having no relation to navigation. (R. 5–7.) The action of the Secretary was asserted to be unreasonable and arbitrary and a deprivation of the petitioners' rights as riparian owners to erect wharves (R. 7–8). The petition concluded with the prayer that the court should adjudge the petitioners to be entitled to approval of their application, and that it should issue its writ of mandamus commanding the Secretary and the Chief of Engineers to authorize the construction in the Potomac River (R. 8–9).

In response to a rule to show cause, the respondent Brown admitted that the application for construction of a wharf had been filed with him by the Sun Oil Company, but stated that he had recommended the approval of the plans as set forth in the petition and that he had "done all that the law requires him to do, and is without power to do anything further" (R. 12).

The respondent Secretary of War[1] answered the rule to show cause and admitted that the Chief of Engineers had considered the plans attached to the application for a permit to build the wharf and had found that the wharf as planned would not obstruct navigation in the waters of the Potomac River (R.

[1] This proceeding was instituted against Patrick J. Hurley, as Secretary of War. On March 27, 1933, upon motion made to this Court, George H. Dern, as Secretary of War, was substituted as respondent in place of Patrick J. Hurley.

14). He denied, however, that his refusal to authorize the construction was not based upon the ground of obstruction to navigation but was based upon considerations involving the development of public parks and other matters having no relation to navigation. He further averred that the petitioners were without riparian rights that could be destroyed by his refusal to authorize the construction of the wharf (R. 15), and alleged that the petition did not show that the relators were entitled to the performance of any duty on the part of the Secretary of War (R. 16). The respondent stated also that he had acted within the discretion vested in him by Section 10 of the Act of 1899 (R. 16).

The respondent also alleged "that to have authorized the construction of the wharf by the Sun Oil Company would have been to cause the erection of a structure inimical to the proposed improvements as contemplated and authorized by the Act approved May 29, 1930, * * * entitled 'An Act for the acquisition, establishment, and development of the George Washington Memorial Parkway along the Potomac from Mount Vernon and Fort Washington to the Great Falls, and to provide for the acquisition of lands in the District of Columbia and the State of Maryland and Virginia requisite to the comprehensive park, parkway, and playground system of the National Capital,' and that the authorization for the erec-

tion of such structure would be against a public policy of the United States" (R. 16).

It was further answered that the relators had not made application to either of the respondents for permission to erect a wharf and that, therefore, no right had been denied them by the refusal to authorize the Sun Oil Company to construct a wharf in the waters of the Potomac River (R. 16–17). Respondent also stated that—

> he is informed and believes and therefore avers that the United States is the owner in fee of the south bank of the Potomac River within the limits of the District of Columbia to the high water mark of 1792 of the Potomac River (R. 17).

Upon these answers issue was joined (R. 19). At the opening of the case counsel for respondents admitted that the construction of the wharf involved in this case would not obstruct navigation and that the decision of the Secretary of War declining to authorize the construction was not by reason of any matter connected with navigation—

> but that the only thing that the Secretary had in mind was that the project was against public policy and particularly opposed to the program contemplated by the Crampton Act and the proposed George Washington Memorial Parkway (R. 38–39).

It appears that prior to the date of trial, the National Capital Park and Planning Commission had

resolved to take possession of certain property alleged to belong to the United States.[2] This property extended from the high-water mark of 1863 on the south shore of the Potomac River to the thread of the stream (R. 51–53). A part of this property, being the area between the high-water marks of 1863 and 1931, is included in the land upon which the projected wharf would be built. This land was staked out, copies of the resolution were ordered to be placed on the stakes within the area prescribed, and a description of the area had, prior to the hearing of this case, been sent to the Attorney General for the purpose of having suits filed under the Act of April 27, 1912, c. 96, 37 Stat. 93. (R. 51–53, 56–57.)

The Supreme Court of the District of Columbia dismissed the petition and discharged the rule to show cause (R. 35). The Court of Appeals of the District of Columbia affirmed the judgment of the Supreme Court of the District (R. 83).

## SUMMARY OF ARGUMENT

### I

Mandamus is not a proper remedy in this case. Section 10 of the Rivers and Harbors Appropria-

[2] This resolution was passed under the authority of the so-called Crampton Act, c. 354, Sec. 1 (a), 46 Stat. 482, 483: "* * * The National Capital Park and Planning Commission is authorized to occupy such land belonging to the United States as may be necessary for the development and protection of said parkway * * *."

tions Act of 1899 (*infra*, p. 45), upon which the relators rely, commands no action of the Secretary of War. The section does not contain a direction to him but is prohibitory in its form and intent. Moreover, the statute requires interpretation by the Secretary in order to establish the scope of his function. The construction adopted by the Secretary is not an arbitrary one and should not be reviewed in mandamus.

Wholly apart from consideration of the particular statute here involved, the relators are not entitled to relief by mandamus. They are not seeking to construct a wharf for themselves or to obtain a permit to do so. They are seeking to use this extraordinary legal remedy in behalf of another in order to advance their own indirect, conditional, and prospective advantage.

The merits of the controversy between the Secretary of War and the relators turn in large degree upon the title to lands both on the shore of the Potomac River and under the waters of the river. Determination of the question whether the permit, even if ordered, would be effective, depends in large measure upon deciding the title to real property, as to which there is a real and substantial dispute. Mandamus therefore cannot be considered an appropriate procedure for deciding the rights of the parties.

## II

The relators have no rights in the land under the Potomac River sufficient to enable them to build a wharf. The refusal of the Secretary of War to issue to them a permit therefore did not deprive them of any rights to which they were entitled.

The relators have no title to any land below high-water mark in the Potomac River. This follows from the decisions of this Court in *Morris* v. *United States,* 174 U.S. 196, 225, and *Smoot Sand & Gravel Corp.* v. *Washington Airport,* 283 U.S. 348. The original grant of the relators' land carried with it no rights to build a wharf into the river. *Shively* v. *Bowlby,* 152 U.S. 1, 13. The relators, therefore, cannot establish a right to build wharves into the river by reliance upon the grant to their ultimate predecessor in title.

No right to erect wharves in the Potomac River has been acquired either by prescription or usage. Relators do not allege that there is a pier in front of their property or that there ever has been one. If they have a prescriptive right, then, it must be based on long continued usage general to the Virginia shore of the Potomac River.

Maryland decisions with respect to the period prior to the creation of the District of Columbia plainly establish that no right in the riparian owner to build a wharf in navigable streams was recognized in the absence of legislation specifically au-

thorizing such a structure. After 1791 the question was one of the law of the District of Columbia. The relators point to no decision, statute or usage in the District of Columbia which indicates in any way that the law has been changed. It is, of course, obvious that the relators' position cannot be aided by any legislation or usage of the Commonwealth of Virginia.

The relators place their chief reliance upon the Compact of 1785 between the States of Maryland and Virginia. This Court has specifically decided that the Compact granted no private rights beyond the control of the contracting States, and thus beyond the control of the United States as successor to Maryland. *Georgetown* v. *Alexandria Canal Co.*, 12 Peters 91. The courts of the District of Columbia have repeatedly held that the Compact has never been in force in the District. These decisions establish a local rule of property in the District which should be conclusive in this case.

Even if the Compact of 1785 remained in force after the retrocession to Virginia, it can stand no higher than a statutory right of wharfage accorded to a riparian proprietor on a navigable stream. Such a right, both under the decisions of this Court and in Maryland, is a mere license revocable at the pleasure of the legislature until acted upon.

The decisions of this Court in *Shively* v. *Bowlby*, 152 U.S. 1, and in *Marine Railway Co.* v. *United*

*States,* 257 U.S. 47, establish the absence of the rights which the relators claim.

## ARGUMENT

### I

### MANDAMUS IS NOT A PROPER REMEDY IN THIS CASE

#### *A. The statute imposes no duty on the Secretary of War*

The present case is not one in which the writ of mandamus should issue to compel the Secretary of War to act. That remedy is appropriate to compel an officer to act only when the statute under which he is called upon to perform his function imposes a clear duty upon him; the mandate of the statute must be positive, the duty to be performed must be purely ministerial, the obligation to act must be explicit and clearly defined. The law must not only authorize action, but require it. See *United States ex rel. McLennan* v. *Wilbur,* 283 U.S. 414; *International Contracting Co.* v. *Lamont,* 155 U.S. 303, 308.

Section 10 of the Rivers and Harbors Appropriations Act of 1899 (*infra,* p. 45) authorizes but does not require action of the Secretary of War. The section contains no direction to him. It prohibits the building of structures in navigable rivers without his authority. The section provides:

> That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and

> it shall not be lawful to build or commence the building of any wharf * * * or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, * * * except on plans recommended by the Chief of Engineers and authorized by the Secretary of War * * *.

No duty to act is imposed. If the Secretary, for any reason, fails to authorize the proposed structure, the unsuccessful applicant may not proceed with his plans. Even so the courts may not direct the Secretary to approve that which he has declined to approve, and the applicant's remedy is with Congress.

This Court in *Sanitary District of Chicago* v. *United States,* 266 U.S. 405, considered the consequences of the Secretary's refusal under this section to permit a certain diversion of water. It was there held that the Secretary's action invaded no rights of the applicant and that he had merely refused an application "to remove a prohibition that Congress imposed." The Court suggested (p. 431) that argument calculated to show that great loss was threatened by the Secretary's refusal to approve the increased diversion should be addressed to Congress "to induce a modification of the law that now forbids that increase unless approved as prescribed."

This was the plain purpose of the statute—to prohibit all structures in navigable rivers of the

United States unless authorized by the Secretary of War. The power to approve, conferred by the statute, implies the power to withhold approval, and the duty is plainly not ministerial. There is no statutory direction that any structure be approved and the discretion of the Secretary in withholding approval may not be controlled by mandamus. *Apfel* v. *Mellon*, 33 F. (2d) 805 (App.D.C.), certiorari denied, 280 U.S. 585.

Moreover, we submit, the statute involved in the present case requires interpretation by the Secretary in order to establish the scope of his function and the limits of proper action by him upon applications for building in navigable waters. Here, the Secretary, as appears from his answer to the rule to show cause, construed Section 10 as conferring discretion to withhold approval of wharf plans whenever he deemed the erection of the structure inimical to the interests and public policy of the United States. In this case invasion of the property and interference with plans of the Federal Government as declared by statute were deemed an appropriate ground for refusal of the requested authorization. (R. 16.) Neither the construction of the statute, nor the Secretary's exercise of discretion was arbitrary or capricious.[3] Where the statute under

[3] The legislative history of the Act of 1899 sheds no light on the purposes of Section 10. Section 9 of that Act requires, however, that Congress assent to the building of bridges, dams, and other like structures, while Section 10 repeated that no obstruction to the navigable capacity

which an officer is authorized to act is open to construction by him, mandamus will not lie to control his action based upon a tenable interpretation of the statute. See *Ness* v. *Fisher*, 223 U.S. 683; see also *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206, 218. It is not necessary that his construction

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of waters of the United States could be constructed without the affirmative authorization of Congress. As to other structures in navigable waters and as to alterations in the course or capacity of navigable waters consent of Congress is not required if the approval of the Secretary of War has been secured. The apparent distinction thus made between obstructions of the navigable capacity of waters, and wharves and other like structures, suggests that the Secretary might properly refuse a permit for building the latter upon considerations other than their effect upon navigability and even though separately considered they might be innocuous. Thus, it has been held that the Secretary may forbid an alteration in the capacity of navigable waters which was in fact harmless, upon the ground that a number of such alterations might have a harmful cumulative effect. See *Gleason Coal Co.* v. *United States*, 30 F. (2d) 22 (C.C.A. 6th). Cf. *Greenleaf Lumber Co.* v. *Garrison*, 237 U.S. 251, 263, 267–268. Petitioners suggest that the Secretary's power under Section 10 is limited to a determination of what in a particular case would constitute an unreasonable obstruction of navigation (see *Wisconsin* v. *Illinois*, 278 U.S. 367, 413), and rely upon an opinion of the Attorney General (27 Op.A.G. 284) advising that injury to adjacent private property should not be considered in determining whether construction of a dolphin should be permitted in navigable waters. There, however, unlike the present case, the prospective injury would have fallen on property in which the United States had no interest and which it was not called upon to protect. Likewise, in *New York ex rel. Spreager* v. *Department of Health*, 226 N.Y. 209, the contemplated damage to surrounding property was not damage to property belonging to the City of New York.

be one which would be approved upon judicial review, so long as it may be regarded as a possible construction of the Act. See *Work* v. *Rives*, 267 U.S. 175, 183; *Hall* v. *Payne*, 254 U.S. 343; *United States ex rel. Endicott* v. *Mellon*, 39 F. (2d) 505 (App.D.C.), certiorari denied, 282 U.S. 849.

The fact that no provision is made to review the judgment of the Secretary does not militate against our contention that mandamus may not be awarded in cases like the present. See *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316, 325; *In re Rice*, 155 U.S. 396, 403. Cf. *United States* v. *Babcock*, 250 U.S. 328, 331.

*B. Mandamus will not issue where the Secretary's duty turns on a disputed question of title to land*

The merits of the controversy between the Secretary of War and petitioners turn in large degree upon the title to lands, and title to property will not be tried in mandamus proceedings.

The Secretary of War alleged in his answer to the petition for a writ of mandamus "that the United States is the owner in fee of the south bank of the Potomac River within the limits of the District of Columbia to the high water mark of 1792." Unless the land bordering on the river was formed by accretion it belonged to the United States and not to the relators. Whether the land bordering on the river at the *locus in quo* was formed by accretion was a question of fact. The answer to the

question of ownership of this strip of land was a complicated one, requiring recourse to geological data and other evidence. Preliminary steps have been taken by the Government to bring to a judicial determination the Government's title to this disputed area (R. 51–53; 56–57). In the meantime, the title to a part of the petitioner's land is clouded, and where a substantial doubt exists in relation to title, mandamus will not lie. Cf. *Bayard* v. *United States ex rel. White,* 127 U.S. 246; *Ex parte Hughes,* 114 U.S. 147. See also *Ex parte Hussein Lutfi Bey,* 256 U.S. 616, 619; *Ex parte Chicago, R. I. & P. Ry. Co.,* 255 U.S. 273, 275; *Ex parte Muir,* 254 U.S. 522.

In *United States ex rel. Redfield* v. *Windom,* 137 U.S. 636, the relator sought to compel the Secretary of the Treasury to prepare and issue a draft to the relator in payment of a duly audited and approved account. The duty to deliver the draft was clear, but the Secretary withheld it. In response to a rule to show cause, he pleaded a special agreement with the relator, by which he was authorized to retain the draft until the relator had performed certain conditions, which it was alleged he had failed to fulfill. This Court said (p. 646) that the answer raised disputed questions of law and fact, which should not be tried in a mandamus proceeding; this circumstance alone was regarded as sufficient cause for discharge of the rule and refusal to issue the writ. Similarly, in the present case, the dispute as to the title of the property in ques-

tion raises controverted matters justifying denial of the relief sought by the relators.

There is a like controversy between the relators and the United States as to the ownership of lands under the waters of the Potomac River. We contend that full and exclusive title to these lands is vested in the United States, as we shall show more particularly in Point II of our brief. If, as we believe, the United States was the proprietor of the lands upon which the proposed wharf was to be built, either those lands bordering the waters or those beneath them, the structure which petitioners contend should be authorized would constitute an encroachment which they had no privilege to build upon the lands of another. Since determination of the question whether the permit, even if ordered, would be effective, depends in large measure upon deciding the title to real property, as to which there is a real and substantial dispute, mandamus cannot be considered an appropriate procedure for adjudicating the rights of the parties. Cf. *Turner* v. *Fisher*, 222 U.S. 204.

## II

THE RELATORS HAVE NO RIGHTS IN THE LAND UNDER THE POTOMAC RIVER SUFFICIENT TO ENABLE THEM TO BUILD A WHARF; THE REFUSAL OF THE SECRETARY OF WAR TO ISSUE TO THEM A PERMIT THEREFORE DID NOT DEPRIVE THEM OF ANY RIGHTS TO WHICH THEY WERE ENTITLED

Even though it be held that the authority of the Secretary of War under the Act of March 3, 1899, *supra*, is limited to the question whether a proposed structure will interfere with navigation, the re-

lators are not entitled to the permit they seek if it appears that they have no authority to build the wharf in question. If the relators have no such right, they would not be able to build the wharf even if the permit were granted (*Attorney General* v. *Hudson County Water Co.*, 76 N.J. Eq. 543; *Cobb* v. *Lincoln Park,* 202 Ill. 427) and it would seem plain that the courts below were correct in refusing to issue a writ of mandamus. As the Supreme Court of the District of Columbia said in this case (R. 33):

> If this Court should grant the prayer of the petition and issue its writ of mandamus today, then tomorrow the proper authorities of the Government may successfully invoke our aid to prevent the construction of the wharf. The Court is therefore asked to do a futile thing, if not to compel a wrongful act.

An examination of the authorities shows, we believe, that the relators have no right or privilege to build a wharf in the Potomac River and that the Secretary of War was therefore justified in refusing to grant to them a permit even though he had concluded that the proposed wharf would not interfere with navigation.

*A. The relators have no title to any land below high-water mark in the Potomac River and the original grant to their land carried with it no right to build a wharf*

The relators allege in their petition in the Supreme Court of the District of Columbia that they

are the owners of land in the State of Virginia bounded on the north by the Potomac River (R. 2–4). They do not assert the ownership of any land in the District of Columbia. The petition and the evidence do not show the ultimate source of the relators' Virginia title, but it may be assumed to have been derived under mesne conveyances from the grant made on September 27, 1688, by King James II to Lord Culpepper. In *Morris* v. *United States,* 174 U.S. 196, 225, this Court held that the earlier grant to Lord Baltimore was not "affected by the subsequent grant to Lord Culpepper," and that as a consequence no part of the bed of the Potomac River was embraced in the grant to Lord Culpepper. In *Smoot Sand & Gravel Corp.* v. *Washington Airport,* 283 U.S. 348, this Court held that the boundary line between the District of Columbia and Virginia was at high-water mark on the south shore. This decision was based on a construction of the original grants and establishes the proposition that the relators' predecessors in ownership obtained no title to any land below high-water mark on the south shore of the Potomac River. The title to all land in the bed of the Potomac River to high-water mark on the Virginia shore is in the United States as the successor to Maryland under the original grant to Lord Baltimore. *Morris* v. *United States, supra,* at 230.

It follows from these decisions that the relators have no right to construct a wharf in the Potomac

River as owners of the land on which the wharf is to be built, for they own no land below high-water mark. Moreover, the grant from King James II to Lord Culpepper on September 27, 1688, upon which the relators' rights ultimately depend, carried with it no riparian rights of any sort in the Potomac River. Our contention on this point is established, it would seem, by this Court's decision in *Shively* v. *Bowlby,* 152 U.S. 1. In that case, after stating (p. 11) that—

> By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King,

this Court said (p. 13):

> It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention. * * *
>
> By the law of England, also, every building or wharf erected, without license, below high water mark, where the soil is the King's, is a purpresture, and may, at the suit of the King, either be demolished, or be seized and rented for his benefit, if it is not a nuisance to navigation.

See also *Weber* v. *Harbor Commissioners,* 18 Wall. 57, 65.[4]

When the grant to Lord Culpepper was made in 1688, the Crown had already granted to Lord Baltimore the entire Potomac River to high-water mark on its south shore. It follows that Lord Culpepper's grant carried with it no right to build wharves into the Potomac River. And even if there had been no prior grant to Lord Baltimore, it seems plain from this Court's decision in *Shively* v. *Bowlby, supra,* that private owners of land along the Potomac River in what is now Virginia obtained no right valid against the Crown or its representatives to build wharves into the river. Such structures, as this Court has said, would have been purprestures subject to abatement or to seizure and use for the benefit of the King or his representative on this continent. These original grants made in the seventeenth century, and by the King, were plainly governed by this principle of common law.

The relators, therefore, cannot establish a right to build wharves into the river by tracing their title to Lord Culpepper. If such a right is appurtenant to their land in Virginia it must have been acquired at some time subsequent to 1688. We submit no such right has been acquired.

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[4] "The right which the appellee claims * * * is the right to wharf out to navigable water. At common law no such right attached to the owner of shore lands." *Western Pacific Ry. Co.* v. *Southern Pacific Co.*, 151 Fed. 376, 390 (C.C.A. 9th).

*B. No right to erect wharves in the Potomac River has been acquired either by prescription or usage.*

The relators make no contention that the right which they assert is based on prescription or other long-continued usage peculiar to their specific tract of land. They do not allege that there is a pier in front of their property or that there ever has been one. There is, therefore, no basis in this record for the assertion of any specific prescriptive right to do what the relators seek to do. If they have such a right, then, it must be based on long-continued usage general to the Virginia shore of the Potomac River, or on a grant.

It has already been pointed out that this Court has decided in *Shively* v. *Bowlby,* 152 U.S. 1, 13, that the owners of land along navigable tidewater do not acquire any right to build wharves unless such a right is expressly granted or acquired by long usage. That there has been such long usage in this case has neither been alleged nor proved; and an examination of the available historical material shows clearly that there was no such usage at the time of the creation of the District of Columbia.

From early times Maryland conferred the right of wharfage upon parties occupying uplands washed by navigable streams, but in every case the right was conferred by special acts of the legislature giving defined rights under definite limitations at particular localities. Some of these statutes are referred to and summarized in the opinion

of the Supreme Court of the District of Columbia in this case (R. 27–30), and it is not necessary to recount them here. They fail to show any general usage or privilege in Maryland to build wharves into the Potomac River, and by their express grants of such a privilege in particular cases they emphasize that Maryland retained to itself its power to control the use of land below high-water mark and that there was no general privilege to construct wharves in the absence of specific legislative authority. The first *general* grants to riparian proprietors in Maryland to make improvements in the waters in front of their land and to construct wharves was not made until 1835. Maryland Acts, 1835, c. 168. This grant was limited to owners in fee simple, but in 1862 it was extended generally. Maryland Acts, 1862, c. 129, Sec. 39. These grants obviously came too late to confer any authority upon the present relators, and the fact of their enactment shows that no such general right had been recognized by the Maryland law before.[5]

The relators state in their brief (p. 20) that "by the usage of over three hundred years in Maryland and Virginia, the riparian owner has been allowed to maintain a wharf into navigable water * * *."

[5] The Compact of 1785 (see pp. 29–39, *infra*) is further evidence that no such general right of wharfage existed, for its provisions on this subject would have been unnecessary if both States had recognized such a right when it was adopted.

There is no evidence whatever in the record to justify this statement, and there is no foundation for it in the scanty material collected in the relators' brief. The wharves referred to in the quotations on pp. 17–18 of the relators' brief may have been built pursuant to grant or express legislative authority. The authors cited have of course made no investigation of this question. Their statements therefore fall far short of showing that there ever was a general right of riparian owners on the Virginia shore of the Potomac River to build wharves against the objection of the owner of the land on which the wharves were built.

The only other authority cited with respect to Maryland is *Baltimore & Ohio Railroad Co.* v. *Chase,* 43 Md. 23, 34. This case was not decided until 1875, more than eighty years after the formation of the District of Columbia, and after the passage of the Maryland Acts of 1835 and 1862 referred to above. It obviously has no effect on the law of the District. Moreover, the statements in the opinion on which the relators rely are purely dicta, for the decision turns entirely on a Maryland statute of 1745 (Act of 1745, c. 9, Sec. 10) expressly granting to riparian proprietors in the City of Baltimore the right to build wharves.

The Maryland decisions with respect to the period before the creation of the District of Columbia plainly establish that no right in the riparian owner to build a wharf in navigable streams was

recognized in the absence of legislation specifically authorizing such a structure. These decisions clearly treat the beds of navigable rivers as the exclusive property of the State and not subject to encroachment by the building of wharves or otherwise except with the express permission of the State in the nature of a grant. In *Casey's Lessee* v. *Inloes,* 1 Gill 430, the plaintiffs claimed under a grant to "Mountenay's Neck," bounded by water. The defendants claimed under a grant to "Bold Venture" which was originally under water adjacent to the plaintiffs' grant. The court held that the proprietors of "Mountenay's Neck" had no riparian rights apart from the Act of 1745, and that the Act of 1745 was not applicable where the land below the water line was privately owned. The court said (p. 512):

> The grant of *"Bold Venture,"* though for the most part covered with water, still passes to the grantee all the soil, under the water, included within its outlines, with all the rights of property incident thereto, subject only to the rights of the public, as to fishing and navigation. If it had been encroached on by any person, as by driving of piles and erecting a wharf, or building a house thereon, an action of trespass or ejectment could have been maintained by the patentee, or those claiming under him.

Other Maryland decisions lead to the same conclusion—that riparian proprietors did not have

the right to build a wharf in the absence of specific authorization by statute, and that such statutes were treated as franchises merely, granting no final property rights until they were acted on. *Harrison* v. *Sterett*, 4 Harris & McH. 540 (decided in 1774—the right to wharfage in Baltimore was made to turn entirely on the construction of the Act of 1745); *Browne* v. *Kennedy*, 5 Harris & J. 195; *Giraud's Lessee* v. *Hughes*, 1 Gill & Johns. 249; *Wilson's Lessee* v. *Inloes*, 11 Gill & Johns. 351; *Hammond's Lessee* v. *Inloes*, 4 Md. 138; *Horner* v. *Pleasants*, 66 Md. 475, 477 ("This is a purely statutory grant, * * *"). The questions involved in these decisions related to the period just before 1791, when the District of Columbia was created, and show plainly that no general riparian right to build wharves into the Potomac River was recognized by the law of Maryland prior to that time.[6] After 1791 the question was one of the law

[6] In *Morris* v. *United States*, 174 U.S. 196, 237–240, this Court considered *Browne* v. *Kennedy*, *supra*, and *Wilson's Lessee* v. *Inloes*, *supra*, and said that they gave the statutes of Maryland "a construction at variance with that which prevailed at the time of the cession." But this Court was considering the cases only with respect to the question whether the early Maryland statutes authorized the granting of land which lay under navigable waters. The cases were not referred to as bearing on the question of the right to build wharves, and so far as that question is concerned it is plain that they do not represent any change in the Maryland law. That law is, and always has been, that the right of wharfage exists only when it has been specifically granted by the legislature.

of the District of Columbia. The relators point to no decision, statute, or usage in the District of Columbia which indicates in any way that the law has been changed.

It is, of course, obvious that the relators' position cannot be aided by any legislation or usage of the Commonwealth of Virginia. The sovereignty of Virginia, where it borders on the District of Columbia, extends only to high-water mark on the south shore of the Potomac River. This line from the beginning has marked the point beyond which its legislative and political power could not extend. Up to the time of the creation of the District of Columbia, Maryland owned and held the entire bed of the river. At no time has Virginia had any power to legislate with reference to the soil below that mark. The legislation or custom or common law of Virginia obviously could not affect land which Virginia had never owned and over which it had never had any jurisdiction. For this reason, among others, the relators' reference to *Norfolk City* v. *Cooke*, 27 Grat. 430, does not aid them.

It follows, therefore, that the relators have no rights based upon general usage or prescription and that if they have the rights which they claim, they must be based upon the Compact of 1785.

*C. The relators' contention that they are entitled to build a wharf in the Potomac River is not supported by the Compact entered into in 1785 by Maryland and Virginia*

The relators place their chief reliance upon the Compact of 1785 between the States of Maryland and Virginia.[7] The relators contend that—

> the right to build a wharf into the Potomac from the Virginia shore was expressly recognized and legalized as a property right by the Compact of 1785 between Virginia and Maryland, and has been maintained unimpaired by subsequent legislation down to the present time. (Br. 20.)

Article 6 of this Compact provided that the River Potomac should be considered a common highway of navigation and commerce to the citizens of Virginia and Maryland and of the United States. Article 7 provides that—

> The citizens of each state, respectively, shall have full property in the shores of Patowmack river adjoining their lands with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; * * *.

It is contended that this Compact became the law of Maryland by the ratification Act of 1786 (2

[7] The text of the Compact may be found in 1 Dorsey, Md. Laws, 1692–1839, p. 187, and 12 Hening, Va. Statutes, p. 50. For convenience, it is set out in the Appendix, *infra*, pp. 46–52.

Kilty, Md. Laws, c. 1), and of Virginia by the similar Act of 1785 (12 Hening, Va. Statutes, p. 50), and that it became the law of the District of Columbia by the Organic Act of 1801, c. 15, 2 Stat. 103.

The Compact of 1785 has had the consideration of this Court in several cases. It has been definitely decided that it has no bearing upon the determination of the boundary line between the District of Columbia and Virginia. *Morris* v. *United States*, 174 U.S. 196, *supra; Marine Railway Co.* v. *United States*, 257 U.S. 47; *Smoot Sand & Gravel Corporation* v. *Washington Airport*, 283 U.S. 348. In the *Morris case* this Court said the Compact was entered into for the purpose of enforcing criminal laws and regulating navigation in the Potomac River (174 U.S. at 224); in the *Marine Railway case* that it was a regulation of commerce (257 U.S. at 64).

But this Court has decided specifically that the Compact of 1785, and the laws of Maryland and of Virginia and of the United States which followed it, granted no private rights beyond the control of the contracting States, and thus beyond the control of the United States as successor of Maryland as owner of the land in the bed of the Potomac River. In *Georgetown* v. *Alexandria Canal Co.*, 12 Peters, 91, this Court said (p. 96):

> The compact made in the year 1785, between Virginia and Maryland, was made by the two states, in their character as states.

> The citizens, individually, of both commonwealths, were subject to all the obligations imposed, and entitled to all the benefits conferred by that compact. But the citizens, as such, individually, were in no just sense the parties to it; those parties were the two states, of which they were citizens. The same power which established it, was competent either to annul or modify it. Virginia and Maryland, then, if they had retained the portions of territory respectively belonging to them on the right and left banks of the Potomac, could have so far modified this compact as to have agreed to change any or all of its stipulations. They could, by their joint will, have made any improvement which they chose, either by canals along the margin of the river, or by bridges or aqueducts across it, or in any other manner whatsoever. When they ceded to congress the portion of their territory, embracing the Potomac river, within their limits, whatsoever the legislatures of Virginia and Maryland could have done by their joint will, after that cession, could be done by congress, subject only to the limitations imposed by the acts of cession. * * *

Again, in *Potomac Steamboat Company* v. *Upper Potomac Steamboat Company*, 109 U.S. 672, 675, this Court said:

> The nature and extent of this compact were considered by this court in *Georgetown* v. *Alexandria Canal Co.*, 12 Peters, 91, where it was declared to be a compact between the

> States, as such, to which the citizens of neither were parties, and, being subject to the will of the States, as to any changes in its stipulations, it was equally under the control of Congress, after the cession.

These cases seem to establish beyond question that even if the Compact of 1785 is still in force with respect to the District of Columbia, it affords to the relators individually no basis for the assertion of their rights as against the United States. It was at most a commercial and political arrangement between sovereigns and the right of individuals under it were not in the nature of grants but remained at all times subject to the control of the contracting parties. The Compact therefore affords the relators no basis for the assertion of any rights in the Potomac River against the United States.

Moreover, the Compact necessarily came to an end so far as the District of Columbia was concerned, when the titles of the two contracting parties were united in one. It is a familiar doctrine of common law that immediately upon the uniting of dominant and servient estates in the same owner, the servitude is extinguished. Washburn, Easements and Servitudes (4th ed.) 683–685; *Atwater* v. *Bodfish*, 11 Gray (Mass.) 150; *Coleman's Appeal*, 62 Pa. 252, 274; *Wilder* v. *Wheeldon*, 56 Vt. 344. It follows that: "The compact of 1785 never was in force in the District of Columbia." *Evans* v. *United States*, 31 App.D.C. 544, 550. To the same

effect is *Herald* v. *United States,* 284 Fed. 927 (App.D.C.).

Nor can it be said that the retrocession of part of the District of Columbia to Virginia in 1846 operated to revive the Compact of 1785 or to reestablish the privileges granted by the Compact. Whatever privileges Virginia possessed under the Compact were destroyed by the joint cession to the United States. The Act of retrocession (Act of July 9, 1846, c. 35, 9 Stat. 35) made no mention of the rights which had been granted by the Compact,[8] and the merged privileges were in no way revived. It is well recognized as a principle of common law that when servitudes are extinguished through the uniting of the dominant and servient estates in the same owner, the servitude does not again arise upon severance of the estates unless it be reimposed by express words. *Morgan* v. *Meuth,* 60 Mich. 238; *Fetters* v. *Humphreys,* 19 N.J. Eq. 471; *Plimpton* v. *Converse,* 42 Vt. 712. *In Evans* v. *United States,* 31 App.D.C., 544 *supra,* the court said (p. 552):

> The easements and privileges she possessed in the river, under the compact, were destroyed by the cession to the United States,

[8] The terms of this statute, so far as they relate to the retrocession of the territory, were that "* * * all of that portion of the District of Columbia ceded to the United States by the State of Virginia, and all the rights and jurisdiction therewith ceded over the same be, and the same are hereby, ceded, and forever relinquished to the State of Virginia, in full and absolute right and jurisdiction, as well of soil as of persons residing or to reside thereon."

> and, having been lost, they could not be revived by the mere reconveyance of the territory ceded, unless expressly recreated in the act of retrocession.

The courts of the District of Columbia have uniformly held that the Compact of 1785 was never in force in the District of Columbia. *Evans* v. *United States,* 31 App.D.C. 544; *Marine Railway Co.* v. *United States,* 49 App.D.C. 285, affirmed, 257 U.S. 47; *Herald* v. *United States,* 284 Fed. 927 (App. D.C.).[9] The defendant in the *Evans case* had been arrested and charged with the violation of an Act of Congress prohibiting fishing by means of dip nets and certain other contrivances in the waters of the Potomac River. It was his defense that Article 7 of the Compact, which *inter alia* declared the right of fishing to be common to the citizens of both States, was warrant for his action. But the court held that the privileges contained in Article 7 were destroyed by the cession of Maryland and Virginia to the United States, and that consequently when the United States became the exclusive owner of the Potomac River and its beds and shores, Congress in the exercise of its police power had authority to regulate fishing in the Potomac River within the District of Columbia. The holding was based upon what this Court had said rela-

[9] The Court of Appeals in the instant case said (R. 64): "It has been decided so frequently by the courts that it is not in force in the District of Columbia as to almost render the question moot."

tive to the Compact in *Georgetown* v. *Alexandria Canal Co., supra.* It was asserted by the defendants in the *Evans* and *Herald cases* that the privilege of fishing under the Compact was a vested right. The court concluded that none of the rights or privileges set out in Article 7 pertained to interests in the soil but were limited to "privileges granted by the compact, so long as the States, the parties, continue the agreement in force." 31 App.D.C. at 549.

We submit that this holding is a necessary conclusion from *Georgetown* v. *Alexandria Canal Co.,* where this Court held that the United States after the cession could have changed or modified all of the provisions of the Compact. The mutual arrangements between the two States came to an end when the parties to the Compact were superseded by the United States.

Ever since the organization of the District of Columbia, Congress has asserted title to the high-water mark on the Virginia shore within the District and has exercised jurisdiction thereover without dispute. This Court in the *Marine Railway case* (257 U.S. at 65–66) called attention to the fact that Section 1 of the Revised Statutes relating to the District of Columbia describes the District of Columbia as "including the river Potomac in its course through the District," and then observed that this "imports an assertion by Congress that the *title* of the United States embraces the whole river bed; and the jurisdiction of the District

over the river seems to have been exercised without dispute." (Italics ours.) As one instance of the exercise of such exclusive dominion we call attention to the Act of Congress making it unlawful for any person to fish with nets in the Potomac River (Act of March 3, 1901, c. 854, sec. 896, 31 Stat. 1189, 1335). Congress did not consult Virginia when this legislation was enacted and there was, of course, no necessity for the concurrence of Maryland. The concluding sentence of Article 7 of the Compact of 1785 prohibited citizens of Virginia from fishing with nets or seines on the shores of Maryland, but otherwise recognized the right to fish as common to all citizens of the two States. Congress undertook to enact legislation relating to this right notwithstanding the provisions of Article 7 of the Compact, and without any reference to the Compact. The same is true of the Act of Congress granting to the Alexandria Canal Company rights to put structures and otherwise deal with the shores of the Potomac River at the water front of Georgetown which was considered by this Court in *Georgetown* v. *Alexandria Canal Co., supra.* Another such statute is the Act of February 3, 1913, c. 25, 37 Stat. 656 (D.C. Code, Title 6, Sec. 305), which forbids the erection of a wharf in the District of Columbia without a permit from the District Commissioners.

Both the petitioners and the dissenting members of the court below (R. 79) put strong reliance upon a sentence appearing in this Court's opinion in the

*Marine Railway case,* in support of the contention that the Compact is still in force. The language relied on is (257 U.S. at 63):

> The original state of things was not changed by the grant of Virginia and the regrant by the United States of the part of the District on the Virginia side.

But it is plain that this language related solely to the question of boundary. The Court held that the boundary between the District of Columbia and Virginia was not affected by the grant from Virginia and the regrant to that Commonwealth. It is obvious that the Court did not intend this language to apply to private rights claimed under the Compact. That the Court did not mean to hold that the Compact was still in force is clear from what was said at the end of the paragraph following the statement quoted above. Speaking of the Compact, it was said (p. 64):

> It may be laid on one side even if it ever was in force in the District of Columbia, which has been denied on the ground that the compact was abrogated so far as it affected this land by the grant of the United States. *Evans* v. *United States,* 31 App. D.C. 544, 550. See *Georgetown* v. *Alexandria Canal Co.,* 12 Pet. 91.

Furthermore, this Court has often given effect to the rule that the existence and nature of riparian rights is a question of local law and governed by local statutes and decisions. *Shively* v. *Bowlby,* 152 U.S. 1; *Philadelphia Co.* v. *Stimson,* 223 U.S.

605, 632; *Arkansas* v. *Tennessee,* 246 U.S. 158, 176. The decision of this Court in *Georgetown* v. *Alexandria Canal Co.,* 12 Peters 91, together with the three decisions of the Court of Appeals of the District of Columbia already referred to (*Evans* v. *United States,* 31 App.D.C. 544; *Marine Railway Co.* v. *United States,* 49 App.D.C. 285, affirmed, 257 U.S. 47; *Herald* v. *United States,* 284 Fed. 927 (App.D.C.)) would seem to establish a local rule of property in this District to the effect that the Compact is not in force in the District and that therefore it affords no basis for any claim of rights appurtenant to lands in Virginia on the south shore of the Potomac River. Cf. *Massachusetts* v. *New York,* 271 U.S. 65, 89.

The United States owns the lands in the bed of the Potomac River, and, subject to the qualifications, perhaps, that the land must be devoted to a public use, and that a navigable channel must be left in the Potomac, the United States may do with the land as it sees fit. *Morris* v. *United States,* 174 U.S. 196, *supra,* involved the title to over 750 acres of land made by filling in the bed of the Potomac River in the south part of the present City of Washington, and *Marine Railway* v. *United States,* 257 U.S. 49, involving land made by filling in the bed of the Potomac River adjacent to the Virginia shore. In each case it was held that the United States was entitled to the made land.

Even if the Compact of 1785 remained in force after the retrocession to Virginia, it does not sup-

port the relators' claims. Given its greatest effect, the Compact cannot stand higher than a statutory right of wharfage accorded to a riparian proprietor on a navigable stream, and such a statutory right this Court in *Shively* v. *Bowlby*, 152 U.S. 1, 56, declared to be "a mere license revocable at the pleasure of the legislature until acted upon." The Maryland court has decided that this is the effect to be given to the statutes of that State allowing the construction of wharves. (*Giraud's Lessee* v. *Hughes*, 1 Gill & Johns. 251; *Casey's Lessee* v. *Inloes*, 1 Gill 430, 498; Cf. *Baltimore* v. *McKimm*, 3 Bland Ch. 453, 466; *Linthicum* v. *Coan*, 64 Md. 439, 453; *Classen* v. *Chesapeake Guano Co.*, 81 Md. 258, 267), and certainly no greater effect can be given to the Compact. In the present case, the relators have not exercised the right to wharf out if they ever had any right, nor had they done so prior to the passage of the Crampton Act (Act of May 29, 1930, c. 354, 46 Stat. 483) which provides for the taking over of a portion of the bed of the Potomac River and contiguous land for the construction of the George Washington Memorial Parkway. The "shores of the Potomac" are specifically referred to in the Act. Under the authority thus granted by this Act the National Capital Park and Planning Commission has taken possession of the land on which the relators seek to build their wharf (R. 51–53). The Crampton Act was adopted in furtherance of the general policy of Congress, announced in the Act

of June 6, 1924, c. 270, 43 Stat. 463. It thus appears that Congress has taken away the right of wharfage if it ever existed.

*D. The decisions of this Court in Shively v. Bowlby, 152 U.S. 1, and Marine Railway Co. v. United States, 257 U.S. 47, establish the absence of the rights which the relators claim*

There are two decisions of this Court which seem of especial importance in considering the present controversy. They show beyond question, we believe, that the relators have no right against the United States to build a wharf into the Potomac River. These two cases are *Shively* v. *Bowlby*, 152 U.S. 1, and *Marine Railway Co.* v. *United States*, 257 U.S. 47.

In *Shively* v. *Bowlby, supra*, it appeared that the Legislature of Oregon in 1862 had by statute authorized the owners of land lying upon a navigable stream to build wharves into the stream beyond the line of low-water mark. Shively owned land on the Columbia River which he had obtained by grant from the United States, and under the statute he consequently had authority to construct a wharf in front of his land. While this statute was still in force, the Legislature in 1872 passed another act providing for the sale of submerged lands under navigable waters to private parties under certain limitations and restrictions. Bowlby claimed title to land below high-water mark on the Columbia River, adjacent to Shively's land, and Bowlby had erected a wharf upon the shore of the

river below high-water mark and extending several hundred feet into the river. Shively contended that he was entitled to the land below high-water mark and that the occupation of the land by Bowlby deprived him of his right of wharfage.

In deciding the controversy, this Court made an extensive review of the many decisions relating to riparian rights. It held that Shively's grant from the United States was bounded by high-water mark since it had always been the policy of the United States, in the absence of controlling considerations to the contrary, to reserve the lands below high-water mark to the States. It was held, therefore, that Shively's grant from the United States gave him no title to the lands below high-water mark, and that he had no right of wharfage or other interest with respect to the land below high-water mark unless that right had been given him by Oregon. That right had been conferred by the Oregon statute of 1862, but this Court, after quoting the opinion of the Supreme Court of Oregon regarding the effect of this statute, accepted the conclusion of that court that (p. 56)—

> The authority conferred by the statutes of Oregon upon upland owners on navigable rivers to construct wharves in front of their land did not vest any right until exercised, but was a mere license revocable at the pleasure of the legislature until acted upon; and that the State had the right to dispose of its tide lands free from any easement of the upland owner.

It was accordingly held that Shively had no wharfage rights and this bill by which he sought to assert rights in the land below high-water mark was dismissed.

The application of the decision in *Shively* v. *Bowlby* to the present controversy seems inescapable. The relators' land is bounded by high-water mark on the Potomac shore, and the grant to their predecessor in title, like the grant to Shively, carried with it no rights to construct wharves in the river. The relators rely upon the Compact of 1785 and the legislation carrying it into effect, just as Shively relied upon the Oregon statute of 1862. But that statute granted Shively no rights which were beyond recall by the State, and for similar reasons it should be held here, we believe, that the Compact of 1785, even if it is still in force, cannot prevail against subsequent legislation of the United States as evidenced the Act of February 3, 1913, c. 25, 37 Stat. 656 (D.C. Code, Title 6, Sec. 305), and by the Crampton Act, and the action of the National Park and Planning Commission in pursuance of the latter statute.

Moreover, one of the bases of the decision in *Shively* v. *Bowlby* was that it was not the policy of Congress in dealing with the public lands of the United States to grant any rights in the land under navigable rivers. If that was the policy with respect to the land involved in *Shively* v. *Bowlby*, it would seem to have been equally the policy with respect to the public land involved in this case. The

same policy was referred to and made a basis of the decision in *Morris* v. *United States*, 174 U.S. 196, *supra*.

The other decision of this Court which seems to us to be a conclusive bar to the relators' position is *Marine Railway Co.* v. *United States*, 257 U.S. 47, *supra*.[10] There the United States brought a suit in the Supreme Court of the District of Columbia to recover the possession of land which had been made by filling in below low-water mark on the *south* shore of the Potomac River adjacent to Virginia. It is not true, as the dissenting members of the court below seem to have thought (R. 77), that this case involved simply a question of boundary. The United States sought and obtained a judgment that it was entitled to the possession of the land. The Court held not only that the made land was in the District of Columbia and therefore within the jurisdiction of the Supreme Court of the District of Columbia, but also that the United States was entitled to recover the possession of the land. This Court said (p. 66):

> It may happen that such filling as is done in this case will interrupt previously existing access to the water front. But that does not affect the right of the United States to possession of the land. What other rights, if

[10] The brief for the United States in the *Marine Railway case*, No. 45, Oct. Term, 1921, pp. 132–157, contains an elaborate discussion of many of the questions raised in the present case.

any, the plaintiff in error may have does not concern us now.

If the United States could fill in the land in Battery Cove involved in the *Marine Railway case* and be entitled to the exclusive possession of the land so made, it seems to follow that the United States could fill in the land in front of the relators' property and be entitled to the possession of that land. If the United States can fill in the land, it must follow that the relators had no right to build a wharf on the land against the objection of the United States.

As has been pointed out, *Marine Railway Co.* v. *United States* did not involve simply a question of boundary or jurisdiction. It involved and decided a substantive question which seems to us a necessary bar to the contentions of the relators here.

## CONCLUSION

The judgment below is correct and should be affirmed.

Respectfully submitted.

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APRIL, 1933.

# APPENDIX

Section 10 of the Act of March 3, 1899, c. 425, 30 Stat. 1121, 1151 (U.S.C., Title 33, Sec. 403), known as the River and Harbors Appropriation Act of 1899, provides as follows:

> SEC. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

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## THE COMPACT OF 1785

The compact entered into in 1785 between Maryland and Virginia [11] was as follows:

> *First.* The commonwealth of Virginia disclaims all right to impose any toll, duty, or charge, prohibition or restraint, on any vessel whatever sailing through the capes of Chesapeake bay to the state of Maryland, or from the said state through the said capes outward bound; and agrees that the waters of Chesapeake bay, and the river Pocomoke, within the limits of Virginia, be forever considered as a common highway, free for the use and navigation of any vessel belonging to the said state of Maryland, or any of its citizens, or carrying on any commerce to or from the said state, or with any of its citizens; and that every such vessel inward or outward bound, may freely enter any of the rivers within the commonwealth of Virginia as a harbour, or for safety against an enemy, without the payment of port duties, or any other charge; and also, that the before-mentioned parts of Chesapeake bay, and Pocomoke river, be free for the navigation of vessels from one part of the state of Maryland to another.
>
> *Second.* The state of Maryland agrees that any vessel belonging to the commonwealth of Virginia, or any of its citizens, or carrying on commerce to or from the said commonwealth, or with any of its citizens, may freely enter any of the rivers of the said state of Maryland as a harbour, or for safety against an enemy, without the payment of any port duty or other charge.

[11] The text of the compact is given in 1 Dorsey, Maryland Laws, 1692–1839, p. 187, and 12 Hening, Virginia Statutes, p. 50.

*Third.* Vessels of war, the property of either state, shall not be subject to the payment of any port duty or other charge.

*Fourth.* Vessels not exceeding forty feet keel, nor fifty tons burthen, the property of any citizen of Virginia or Maryland, or of citizens of both states, trading from one state to the other only, and having on board only the produce of the said states, may enter and trade in any part of either state, with a permit from the naval-officer of the district from which such vessel departs with her cargo, and shall be subject to no port charges.

*Fifth.* All merchant vessels (except such as are described in the fourth article) navigating the river Potowmack, shall enter and clear at some naval office on the said river, in one or both states, according to the laws of the state in which the entry shall be made. And where any vessel shall make an entry in both states, such vessel shall be subject to tonnage in each state only in proportion to the commodities carried to, or taken from, such state.

*Sixth.* The river Potowmack shall be considered as a common highway, for the purpose of navigation and commerce to the citizens of Virginia, and Maryland, and of the United States, and to all other persons in amity with the said states, trading to or from Virginia or Maryland.

*Seventh.* The citizens of each state respectively shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; but the

right of fishing in the river shall be common to, and equally enjoyed by the citizens of both states: *Provided*, That such common right be not exercised by the citizens of the one state, to the hindrance or disturbance of the fisheries on the shores of the other state; and that the citizens of neither state shall have a right to fish with nets or seines on the shores of the other.

*Eighth*. All laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine, in the river Potowmack, or for preserving and keeping open the channel and navigation thereof, or of the river Pocomoke, within the limits of Virginia, by preventing the throwing out ballast, or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both states.

*Ninth*. Lighthouses, beacons, buoys, or other necessary signals, shall be erected, fixed, and maintained upon Chesapeake bay, between the sea and the mouths of the rivers Potowmack and Pocomoke, and upon the river Potowmack, at the expense of both states. If upon Potowmack river, at the joint and equal charge of both states; and if upon the before-mentioned part of Chesapeake bay, Virginia shall defray five parts, and Maryland three parts of such expence; and if this proportion shall in future times be found unequal, the same shall be corrected. And for ascertaining the proper places, mode, and plans for erecting and fixing lighthouses, buoys, beacons and other signals, as aforesaid, both states shall upon the application of either to the other, appoint an equal number of commissioners, not less than three nor more than five from each

state, to meet at such times and places as the said commissioners or a major part of them, shall judge fit, to fix upon the proper places, mode, and plans for erecting and fixing such lighthouses, beacons, or other signals, and report the same, with an estimate of the expence, to the legislatures of both states, for their approbation.

*Tenth.* All piracies, crimes, or offences committed on that part of Chesapeake bay which lies within the limits of Virginia, or that part of the said bay where the line of division from the south point of Potowmack river (now called Smith's Point) to Watkins's Point, near the mouth of Pocomoke river, may be doubtful; and on that part of Pocomoke river, within the limits of Virginia, or where the line of division between the two states upon the said river, is doubtful, by any persons not citizens of the commonwealth of Virginia, against the citizens of Maryland, shall be tried in the court of the state of Maryland which hath legal cognizance of such offence. And all piracies crimes, and offences committed on the before mentioned parts of Chesapeake bay and Pocomoke river, by any persons not citizens of Maryland, against any citizen of Virginia, shall be tried in the court of the commonwealth of Virginia which hath legal cognizance of such offence. All piracies, crimes, and offences committed on the said parts of Chesapeake bay and Pocomoke river, by persons not citizens of either state, against persons not citizens of either state, shall be tried in the court of the commonwealth of Virginia having legal cognizance of such offences: And all piracies, crimes, and offences committed on the said parts of Chesapeake bay and Pocomoke River, by any

citizen of the commonwealth of Virginia, or of the state of Maryland, either against the other, shall be tried in the court of that state of which the offender is a citizen. The jurisdiction of each state over the river Potowmack shall be exercised in the same manner as is prescribed for the before-mentioned parts of Chesapeake bay and Pocomoke river, in every respect, except in the case of piracies, crimes, and offences committed by persons not citizens of either state, upon persons not citizens of either state, in which case the offenders shall be tried by the court of the state to which they shall first be brought. And if the inhabitants of either state shall commit any violence, injury, or trespass, to or upon the property or lands of the other, adjacent to the said bay or rivers, or to any person upon such lands, upon proof of due notice to the offender to appear and answer, any court of record, or civil magistrate of the state where the offence shall have been committed, having jurisdiction thereof, may enter the appearance of such person, and proceed to trial and judgment, in the same manner, as if legal process had been served on such offender; and such judgment shall be valid and effectual against the person and property of such offender, both in the state where the offence shall have been committed, and also in the state where the said offender may reside, and execution may be issued by the court, or magistrate, giving such judgment, in the same manner as upon judgments given in other cases; or upon a transcript of such judgment, properly authenticated, being produced to any court; or magistrate, of the state where such offender may reside, having jurisdiction within the state, or county where the offender may

reside, in cases of a similar nature, such court, or magistrate, shall order execution to issue upon such authenticated judgment in the same manner, and to the same extent, as if the judgment had been given by the court, or magistrate, to which such transcript shall be exhibited.

*Eleventh.* Any vessel entering into any port on the river Potowmack, may be libelled, or attached for debt, by process from the state in which such vessel entered. And if the commercial regulations of either state shall be violated by any person carrying on commerce in Potowmack or Pocomoke rivers, the vessel owned or commanded by the person so offending, and the property on board, may be seized, by process from the state whose laws are offended, in order for trial. And if any person shall fly from justice, in a civil or criminal case, or shall attempt to defraud creditors by removing his property, such person, or any property so removed, may be taken on any part of Chesapeake bay, or the rivers aforesaid, by process of the state from which such person shall fly, or property be removed; and process from the state of Virginia may be served on any part of the said rivers, upon any person, or property of any person not a citizen of Maryland, indebted to any citizen of Virginia, or charged with injury having been by him committed; and process from the state of Maryland may be served on any part of the said rivers, upon any person, or property of any person, not a citizen of Virginia, indebted to a citizen of Maryland, or charged with injury by him committed. And in all cases of trial in pursuance of the jurisdiction settled by this compact, citizens of either state shall attend as witnesses in the

other, upon a summons from any court, or magistrate, having jurisdiction, being served by a proper officer of the county where such citizen shall reside.

*Twelfth.* The citizens of either state having lands in the other, shall have full liberty to transport to their own state, the produce of such lands, or to remove their effects, free from any duty, tax, or charge whatsoever, for the liberty to remove such produce or effects.

*Thirteenth.* These articles shall be laid before the legislatures of Virginia and Maryland, and their approbation being obtained, shall be confirmed and ratified by a law of each state, never to be repealed, or altered, by either, without the consent of the other.

U. S. GOVERNMENT PRINTING OFFICE 1932

# SUPREME COURT OF THE UNITED STATES.

No. 677.—October Term, 1932.

The United States of America on relation of Lucien H. Greathouse and Rebekah S. Greathouse, Petitioners,
*vs.*
George H. Dern, as Secretary of War, and Lytle Brown, as Chief of Engineers.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[May 8, 1933.]

Mr. Justice Stone delivered the opinion of the Court.

The relators, petitioners here, filed their petition in the Supreme Court of the District of Columbia for a writ of mandamus to compel the Secretary of War and the Chief of Engineers to authorize the construction of a wharf in the Potomac River within the District of Columbia adjacent to their land on the Virginia shore, the construction being forbidden by § 10 of the Act of March 3, 1899, c. 425, 30 Stat. 1121, 1151, 33 U. S. C., § 403, "except on plans recommended by the Chief of Engineers and authorized by the Secretary of War." The judgment of the Supreme Court denying the writ was affirmed by the District Court of Appeals. 63 F. (2d) 137. This Court granted certiorari. — U. S. —.

Petitioners claim title through a grant to their predecessors in interest of a plot of upland lying in the State of Virginia, which extended at the time of the grant to the Potomac River. The upland has been enlarged by the recession of the river toward the north and it is the contention of the petitioners that the enlargement is due to accretion, with the result that their ownership has been extended beyond the shore line of the river, as it existed at the time of the grant, to the present high water line, a claim which is put in issue by the answer. But it is conceded that the bed of the river below high water mark, where the proposed wharf is to be built, lies within the District of Columbia and that title to it and sovereignty over it were vested in the United States by cession

from the State of Maryland of the area constituting the present District of Columbia. See Maryland Laws, 2 Kilty, Sess. of November 1791, c. 45; *Smoot Sand & Gravel Co.* v. *Washington Airport*, 283 U. S. 348; *Maryland* v. *West Virginia*, 217 U. S. 577; *Marine Railway Co.* v. *United States*, 257 U. S. 47, 64; *Morris* v. *United States*, 174 U. S. 196, 225; Revised Statutes relating to the District of Columbia (1875), § 1. Within this area Congress has the plenary power to control navigation which was vested in the United States before the cession and which it exercises generally over navigable waters within the several states. It also acquired by the cession proprietary powers over the lands lying under water, and under Article 1, § 8 of the Constitution, granting exclusive legislative power over the District, the sovereign power to regulate and control their use for public purposes other than navigation.

Petitioners have entered into a contract for the sale of their lands, conditioned upon securing permission to build the wharf, which is to be built and used by the purchaser in connection with a plant to be established on the upland for the storage of gasoline. It is stipulated on the record that the proposed wharf, which is to be constructed in conformity to plans approved by the Chief of Engineers, will not interfere with navigation. Petitioners assert a right as riparian owners to build and maintain it upon two grounds, first, that by the common law rule as developed in the United States, the ownership of land bordering on a navigable river carries with it the right to build and maintain below high water mark a wharf or other structure, not an obstruction to navigation (see *Shively* v. *Bowlby*, 152 U. S. 1; *United States* v. *River Rouge Co.*, 269 U. S. 411, 418; *Norfolk City* v. *Cooke*, 27 Grat. 430; *Baltimore & Ohio Ry.* v. *Chase*, 43 Md. 23) and, second, that by Paragraph "Seventh" of the Compact of 1785 between Maryland and Virginia, ratified by Virginia March 28, 1785, 12 Hening, Virginia Stat. 50, and by Maryland, March 12, 1786, Maryland Laws, 2 Kilty, Session of November 1785, c. 1, it was provided:

"The citizens of each state respectively shall have full property in the shores of Patowmack River adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river; . . ."

They insist that as the proposed wharf will not interfere with navigation and as plans for its construction have been approved

by the Chief of Engineers, it is the legal duty of the Secretary of War, under § 10 of the Rivers and Harbors Appropriation Act of March 3, 1899, to grant the desired permit. It is conceded by the government that the only basis for the Secretary's refusal to authorize the construction of the wharf is that it would be inimical to the establishment of the proposed George Washington Memorial Parkway authorized by Act of Congress of May 29, 1930, c. 354, 46 Stat. 482.

By this legislation Congress appropriated $7,500,000 for the construction of a parkway a part of which is to extend along the Virginia shore of the Potomac River from Mount Vernon to a point above the Great Falls. It authorized the National Capital Park and Planning Commission "to occupy such land belonging to the United States as may be necessary for the development and protection" of the Parkway. Construction of the Parkway was authorized as a part of the federal-aid highway program, and was made conditional upon the contribution by Maryland or Virginia or others of one-half the cost of the required lands, other than those of the United States. But the Commission was empowered, in its discretion, to advance the full cost of the Parkway upon securing undertakings from these states, upon terms prescribed by the statute, to repay one-half of the cost to the federal government. A part of the Parkway, the Mount Vernon Memorial Highway, extending along the Virginia shore of the river from Mount Vernon to a point within the District of Columbia, a short distance below the land of the petitioners, has been completed.

Pending this suit, but before its trial, the Park and Planning Commission, by resolutions of September 24-26, 1931, declared that certain lands of the United States, described by metes and bounds, running along the high water line of 1863 on the Virginia side of the river, as established by United States Coast Survey, and extending to the center line of the channel of the river, are necessary for the development and protection of the Parkway. By further resolution, the Commission declared that it took complete and exclusive possession of these lands which include the river bed where it is proposed to build the wharf and the upland claimed by petitioners by accretion. It directed that copies of the resolutions be posted on each parcel, which was done before the hearing in this suit. A description of each was also sent to the Attorney

General for the purpose of having suits filed under the Act of April 27, 1912, c. 96, 37 Stat. 93, which authorizes suits by the Attorney General to quiet title to lands adversely held or claimed lying under and adjacent to the Potomac River within the District of Columbia. The plans of the Commission also contemplate the construction of a highway across petitioners' upland as a means of access to the Parkway.

It is apparent that petitioners are entitled to the relief prayed only if several doubtful questions are resolved in their favor. They are (1) whether a mandatory duty is imposed upon the Secretary of War by § 10 of the Rivers and Harbors Appropriation Act to authorize the construction of the proposed wharf if he is satisfied that it will not interfere with navigation; (2) whether in fact petitioners have title, by accretion, to the upland adjacent to the river at the point where it is proposed to build the wharf, and thus have the status of riparian owners; (3) whether even as riparian owners of land lying within Virginia, petitioners, in the absence of a legislative grant either by Maryland before the cession or by the United States after it, have a common law right to build a wharf on the adjacent lands of the United States lying in the bed of the river, see *Casey's Lessee* v. *Inloes, et al.*, 1 Gill. 430; *Browne, et al.* v. *Kennedy*, 5 Harris & J. 195; *Giraud's Lessee* v. *Hughes, et al.*, 1 Gill. & Johns. 249, 265; *Wilson's Lessee, et al.* v. *Inloes, et al.*, 11 Gill. & Johns. 351; *Hammond's Lessee* v. *Inloes, et al.*, 4 Md. 138; *Horner* v. *Pleasants*, 66 Md. 475; *Attorney General* v. *Hudson County Water Co.*, 76 N. J. Eq. 543, or if not (4) whether their predecessors in title acquired such a right under Paragraph Seventh of the Maryland-Virginia Compact, *Georgetown* v. *Alexandria Canal Co.*, 12 Pet. 91; *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U. S. 672, 675; (5) whether, if such a right were derived from the Compact, it was not lost before its exercise by the union in the single ownership of the United States of the land under the river, and on both sides of it, which resulted from the cession by Maryland and Virginia of the area originally embraced in the District of Columbia and continued until the retrocession in 1846 of the lands on the Virginia side, see *Georgetown* v. *Alexandria Canal Co., supra; Evans* v. *United States*, 31 App. D. C. 544, 550; *Herald* v. *United States*, 284 Fed. 927; and (6) whether the right claimed is not in any

case subordinate to the power of the United States, in its capacity as proprietor and sovereign, to devote the river bed to a public purpose, as has been done by the action of the Commission, taken under authority of Act of Congress authorizing the George Washington Memorial Parkway. See *Fox River Paper Co.* v. *Railroad Commission of Wisconsin*, 274 U. S. 651; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *Barney* v. *Keokuk*, 94 U. S. 324; *Giraud's Lessee* v. *Hughes, supra; Casey's Lessee* v. *Inloes, et al., supra; Linthicum* v. *Coan*, 64 Md. 439, 453; *Classen* v. *Chesapeake Guano Co.*, 81 Md. 258, 267.

The government contends that in view of the nature of these questions the case is not an appropriate one for mandamus, since ordinarily mandamus against a public officer will not lie unless the right of the petitioner and the duty of the officer, performance of which is to be commanded, are both clear. See *United States* v. *Wilbur*, 283 U. S. 414, 419, 420; No. 15, *Interstate Commerce Commission* v. *New York, New Haven & Hartford R. R.*, decided November 21, 1932; *Redfield* v. *Windom*, 137 U. S. 636; *Bayard* v. *White*, 127 U. S. 246. It is insisted that both the petitioners' riparian ownership and the right to build the wharf which they claim to have derived from it, are doubtful; and in any event that the duty of the Secretary under the statute[1] is not plain and certain, since the words forbidding all structures in any navigable river, "except on plans recommended by the Chief of Engineers and authorized by the Secretary of War", are only permissive, not mandatory, and there is no plain implication of a duty on the part of the Secretary to authorize a structure in the Potomac River

[1] "Sec. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

within the District of Columbia to which there is substantial objection that it infringes the rights or obstructs the public policy of the United States as owner and sovereign of the river bed.

But we find it unnecessary, in the circumstances of this case, to say what effect should be given to these objections alone, whether considered each separately or together. Although the remedy by mandamus is at law, its allowance is controlled by equitable principles, see *Duncan Townsite Co.* v. *Lane*, 245 U. S. 308, 311; *Arant* v. *Lane*, 249 U. S. 367, 371; *Redfield* v. *Windom*, *supra*, 644; cf. *Turner* v. *Fisher*, 222 U. S. 204; *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 95; *People ex rel. Wood* v. *Assessors*, 137 N. Y. 201; *Matter of Lindgren*, 232 N. Y. 459; *McCarthy* v. *Boston St. Comm.*, 188 Mass. 338; *People* v. *Olsen*, 215 Ill. 620, and it may be refused for reasons comparable to those which would lead a court of equity, in the exercise of a sound discretion, to withhold its protection of an undoubted legal right. For such reasons we think the relief sought by mandamus should be denied here, even if petitioners' title to the upland adjacent to the river and their right to build the wharf were less doubtful than they are. The government, through its duly authorized agency, the Park Commission, has declared that both the bed of the river and the upland adjacent to it shall be devoted to a public purpose for the construction of the Parkway, and the plans of the Commission contemplate the taking, by purchase or condemnation, of a part of petitioners' property as a means of access to it. The apparent consequence of authorizing the construction of the wharf would be only to increase the expense to the government of constructing the Parkway, by the cost of destroying the wharf, and by so much of the cost of the wharf and of the other proposed improvements as may be included in the just compensation to be awarded for their taking. Thus the extraordinary remedy by mandamus, invoked to protect rights to which petitioners are not shown to be clearly entitled, would be burdensome to the government without any substantially equivalent benefit or advantage to the petitioners or their vendee, apart from the incidental and irrelevant consequence that petitioners might secure the performance of their conditional contract.

The Court, in its discretion, may refuse mandamus to compel the doing of an idle act, *Turner* v. *Fisher*, *supra*, 209; *Wilson* v. *Blake*, 169 Cal. 449; or to give a remedy which would work a

public injury or embarrassment, (see *Duncan Townsite Co.* v. *Lane, supra; Arant* v. *Lane, supra; Effingham* v. *Hamilton*, 68 Miss. 523; cf. *Matter of Lindgren, supra*, 66; *McCarthy* v. *Boston St. Comm., supra*) just as in its sound discretion, a court of equity may refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest. See *Seaboard Air Line Ry. Co.* v. *Atlanta B. & C. R. Co.*, 35 F. (2d) 609; *Conger* v. *New York R. R. Co.*, 120 N. Y. 29; *Clark* v. *Rochester R. R. Co.*, 18 Barb. 350; *Whalen* v. *Baltimore R. R. Co.*, 108 Md. 11; *Curran* v. *Holyoke Water Power Co.*, 116 Mass. 90; *Southern R. R. Co.* v. *Franklin & P. R. R. Co.*, 96 Va. 693; cf. *Willard* v. *Tayloe*, 8 Wall. 557.

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*